92-449

No.

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

JUNG YUL YU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a sentencing judge have the power to consider evidence of cultural differences which, either standing alone or in combination with other evidence, may justify a downward departure from the Sentencing Guidelines?

2. For sentencing purposes, are cultural differences subsumed within the broad category of "National Origin" thus precluding consideration, or are they factors which are separate and distinct, thus warranting a sentencing court's consideration, when applicable?

3. For sentencing purposes, are policy statements as binding as guidelines on the discretion of the district courts?

4. Did the Court of Appeals improperly resolve a disputed factual issue, where no record of the evidence existed, thus depriving petitioner of his only opportunity to present evidence and develop a record which can adequately be reviewed on appeal?

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OPINIONS BELOW

1. *United States v. Jung Yul Yu,* No. 91-1436, Order of United States Court of Appeals for the Third Circuit dated February 24, 1992 denying petition for rehearing.

2. *United States v. Jung Yul Yu,* No. 91-1436, Majority and Dissenting Opinions of United States Court of Appeals for the Third Circuit dated January 28, 1992.

3. *United States v. Jung Yul Yu,* Criminal No. 90-451-01, Transcript of May 15, 1991, Sentencing Hearing before the Honorable Thomas J. O'Neill, United States District Court (E.D. Pa.).

STATEMENT OF JURISDICTION

On September 25, 1990, petitioner was charged in an information with bribery of a public official in violation of 18 U.S.C. § 201(b)(1)(a).

A guilty plea was entered on December 18, 1990. On May 15, 1991, petitioner was sentenced to a period of ten (10) months incarceration.

An appeal was filed on May 24, 1991 with the Third Circuit Court of Appeals. Argument was heard December 10, 1991, and an opinion affirming the District Court's order was filed on January 28, 1992. There was also a learned dissenting opinion.

On February 10, 1992, petitioner filed a petition for rehearing en banc. Said petition was denied by the Third Circuit Court of Appeals on February 24, 1992. Petitioner hereby filed this petition for a writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND POLICY STATEMENTS INVOLVED

1. **18 U.S.C. § 3553(b)** Application of guidelines in imposing a sentence.

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an

aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentene different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

2. **United States Sentencing Guideline 5H1.10.** Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

* * *

3. The role of appellate courts in resolving factual issues especially where no testimony was permitted in the trial court.

STATEMENT OF THE CASE

Jung Yul Yu was born in Korea in 1931. He was educated in his native country. He served in the Korean Army during the Korean War. He worked in Korea, including having a government position with the Korean equivalent of the United States Internal Revenue Service. He married a Korean national in 1962.

In 1976, when Yu was forty-six (46) years old, he emigrated to the United States with his wife and children. He performed factory work until 1980 when he opened a tax preparation business.

Yu is perceived by members of his immediate and extended family as the family's leader. He has no prior criminal history and as a tax preparer, he has tremendous stature within the Korean-American community. He is presently sixty (60) years old.

Yu's personal taxes were audited from August 1988 to May 1989. The audit was tape-recorded without his knowledge. The IRS agent befriended the Yu family. The agent concluded that a twenty thousand ($20,000) dollar payment that Yu stated was a loan, was in reality, unreported income. When confronted with this information, Yu agreed to pay the agent to "make him free".

On September 25, 1990, Yu was charged in an information with bribery of a public official in violation of Title 18, U.S.C. § 201(b)(1)(a). On December 18, 1990, a guilty plea was entered before the Honorable Thomas J. O'Neill. Prior to sentencing, Yu met with prosecutors and IRS agents and made a good faith effort to cooperate. Due to his failure to associate with criminal offenders, the information he supplied to authorities was not sufficient to warrant a sentencing departure.

On May 15, 1991, Yu was sentenced to a period of ten (10) months incarceration. At sentencing, he urged the court to depart

from the sentencing guideline range. To support his contention, he was prepared to present evidence, including expert testimony, to show that the cultural differences between Korea and the United States, particularly as such differences relate to conduct in this case, would present a valid factor for the court to consider in justifying a downward departure sentence.

The District Court judge did not allow the introduction of this evidence because he held that he did not have the power to consider it under the Sentencing Guidelines.

An appeal was taken. On January 28, 1992, a panel of the Third Circuit Court of Appeals, by majority opinion, affirmed the lower court's decision. There was a strong dissent which is attached. Rehearing en banc was denied on February 24, 1992.

REASONS FOR GRANTING THE WRIT

I.

A SENTENCING JUDGE HAS THE POWER TO CONSIDER EVIDENCE OF CULTURAL DIFFERENCES, WHICH EITHER ALONE OR IN COMBINATION WITH OTHER FACTORS, MAY JUSTIFY A DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES RANGE.

At sentencing, Yu sought to introduce evidence of cultural differences which would create a mitigating circumstance which he contends was not adequately considered and/or adequately considered by the Sentencing Commission when they formulated the guidelines. The Government argued that petitioner's contention was barred by § 5H1.10 of the Sentencing Guidelines. Said section indicates that national origin is not relevant in determination of a sentence. The District Court held that it did not have the power

to consider petitioner's evidence. Specifically, the court stated:

> I understand that point, but I'm going to hold contrary to what I understand what my colleague, Judge Shapiro, has held that I do not have the power to make a downward departure based on the factors you have advanced. Now, please notice that I'm placing this decision on a holding that I do not have the power to consider it. I understand the government is taking an appeal in Judge Shapiro's case. If you take an appeal in this case I will — what are the magic words — staying execution of a sentence that I will be required to impose on the guidelines, so that you can derive the benefit, if any, from the outcome of that appeal. Because if I don't have the power that's the end of it, the sentence stands. If I do have the power then we'll come back and I will then want to hear whatever evidence you want to submit as to whether in this case that power should be exercised, but I will want to consider at that time not only the testimony that you would offer, but I would want to know about Mr. Yu, his schooling, and the fact that he's been in the United States and these are all factors. But just so its clear I'm not exercising any discretion not to use a power that I have, I'm holding I lack the power. Now I believe, I must tell you, I believe that's the correct decision, but what I'm attempting to do is to structure a situation so that if I'm incorrect you will get the benefit of it. . . I think then, with apologies to the witnesses who have come down here to offer the evidence you intended to offer, they should understand that my ruling means no disrespect for their testimony and I don't want

> them to think their coming here is unappreciated because I didn't hear the testimony. But in my view of my power under the sentencing guidelines, it would be irrelevant.

This case procedurally mirrors *United States v. Cook*, 938 F.2d 149 (9th Cir. 1991). In *Cook*, the court held:

> The general rule is that a District Court's discretionary decision not to depart downward from the Guidelines is not subject to review on appeal. But it is crucial that the District Court exercise its discretion. If the Court believes it has no discretion, there is an error of law which you are able to review. In this Case it is evident from the statements of the Court that it believed it had no discretion and so exercised none. The sentence may be reviewed. The Guidelines are not a straight jacket for district judges. They do give discretion.

United States v. Cook, *supra* at 152.

In the case at bar, the District Court also failed to exercise its discretion. In so doing, Yu was denied his only opportunity to present evidence to explain his behavior. Many of his behavioral factors were based on cultural motivation and influences derived from living half a century in Korea, as well as, from his status as a traditional Korean. These factors must warrant consideration.

On appeal, petitioner urged the court to remand back to the District Court so that a full hearing could be held. Though the Court of Appeals affirmed the lower court, it did so on other grounds. The majority opinion stated, in part, ". . . we will simply assume without deciding that in some cases the cultural differences between the United States and another country may justify

downward departure." *United States v. Jung Yul Yu,* No. 91-1436. page 6 (3rd Cir. 1992). (However the Court of Appeals, without hearing Yu's evidence and knowing that the District Court also did not hear said evidence, resolved the factual issues against Yu.)

Other Circuits have affirmed the power of the District Courts to consider cultural differences, motivations and influences as factors warranting downward departures. In *United States v. Big Crow,* 898 F.2d 1326 (8th Cir. 1990), the court upheld the lower court's downward departure which was based on defendant's excellent employment history, community ties, and efforts to succeed in the difficult environment of an Indian reservation.

The *Big Crow* Court did not use the defendant's heritage as an excuse for the crime which he committed. Rather, the Court expressed its opinion that in an unusual circumstance it could be considered a mitigating factor when other factors are present.

In *United States v. Saldana,* No. 88-196 (M.D. Pa., May 19, 1989) (Unpublished), the court also upheld the consideration of cultural or quasicultural motivation in this context (downward departure upheld in escape case where sentencing court found unique circumstances that defendant truly believed he could never leave prison until he paid his fine, defendant did not speak or read English).

It is submitted that the evidence that would have been presented in the instant case presented more compelling grounds for departure then the evidence that was presented in *Big Crow* and *Saldana.*

In *United States v. Jagmohan,* 909 F.2d 61 (2d Cir. 1990) the court dealt with a situation in which the lower court granted a departure because of a defendant's lack of a criminal record, his good work history for the nine years he had been in the country

and the unusual circumstances surrounding his conviction. Defendant had pled guilty to bribery of a New York City environmental officer. The facts showed that defendant had paid the bribe with a personal check. The court viewed this as evidence of lack of sophistication. While it was unclear from where the defendant originated, the court found that the handicap of not being a native American was a sufficient basis to depart where the defendant also exhibited an excellent work history. It should be emphasized that the nature of the offense, namely, bribery, appeared to be significant to the court.

It is submitted that the evidence that would have been submitted in the instant case presented a more compelling situation for departure than that which was presented in *Jagmohan* when a downward departure was affirmed.

As part of its reasoning, the court stated,

> Furthermore, the district court did not abuse its discretion in determining that probation, rather than some period of incarceration below that set forth by the Guidelines, was an appropriate sentence in light of the circumstances presented.
>
> As we have previously noted it was not Congress' aim to straight jacket a sentencing court, compelling it to impose sentences like a robot inside a Guidelines glass bubble, and preventing it from exercising discretion, flexibility or independent judgment.

Jagmohan, supra at 65, citing *United States v. Laramie,* 905 F.2d 599 at 604 (2nd Cir. 1990). *See also, United States v. Swapp,* 719 F. Supp. 1015 (D. Utah 1989).

The case of *United States v. Takai,* 930 F.2d 1427 (9th Cir. 1991) is also on point. In *Takai,* the court permitted the presentation of testimony which showed that a downward departure was justified because the defendant's criminal conduct constituted "single acts of aberrant behavior." As in the instant case the charge was bribery. The court found that a downward departure was justified on single acts of aberrant behavior even though there was a whole series of criminal actions. *Id.* 1432.

The following language of *Takai* is certainly applicable to Mr. Yu:

> Nothing in her background or experience indicates that she was in touch with the kind of smugglers of human beings who might trade in green cards. Everything points to the conclusion of the district court that she stumbled into something, awkwardly, naively, and with insufficient reflection of the seriousness of the crime she was proposing. For eight days she embarked on a covert course that was deeply injurious to good government and subversive of the law of this country. Her action was aberrant."

Id. at 1432.

One of the factors that led the *Takai* court to reach its conclusion is present in the instant case. In *Takai,* the court stated:

> Goldman's conduct did not constitute entrapment in a legal sense, nor was it of a character that could be labeled outrageous and so offered as a legal defense. Nonetheless, as the District Court found Goldman's conduct influenced Magneson and Takai to continue on their criminal course.

Imperfect entrapment, *i.e.* government informant talking a defendant into a crime the defendant is predisposed to commit — is not a mitigating factor. The present case is different in two aspects: the person who solicited the acts was a governmental official who the defendants had every reason to believe was aware of the law; he was not an undercover agent or other informant whose government status was not visible to the defendants, but the defendants themselves were not professional criminals. The conduct of the governmental official must be assessed not abstractly in the air but in the conjunction with the persons whom the conduct had an impact. Goldman adopted toward two persons hitherto innocent of a criminal activity or known criminal association or propensities what the government calls "his 'investigative mode,' making no distinction between these two persons who by happenstance had seen a sudden opportunity to acquire green cards illegally and persons engaged in organized crime as a matter of routine. The justification for lying by a government agent to the latter kind of person may be that such a person has, in effect, declared war on society and the rules of warfare, permitting deception, apply. This case is not the usual undercover case. Magneson and Takai were not at war with society. To lie to them, to deceive them, to conceal from them that their conversations were being taped and to fail to discourage them from their proposed crime were actions with an impact upon their conduct that are properly considered in determining whether the action of each was mitigating.

Id. at 1433.

The instant case presents an even more compelling scenario. Like Takai, Mr. Yu was not entrapped for purposes of a defense at trial. But like Takai, Mr. Yu was preyed upon by an agent on a fishing expedition utilizing a tape rather than a hook. Like Takai, Mr. Yu had no record and was no threat to the United States. Yet the IRS agent taped the entire audit lasting from August 1988 to May 1989. He befriended the Yu family. He had meals with them. The action of the agent was exactly the same as identified in *Takai* as a basis for a downward departure. Indeed Mr. Yu's reaction to the agent was highly influenced by his cultural experiences deriving from his five decades in Korea, and his status as a traditional Korean. The expert witness would have testified in part that the agent's actions, when viewed in the context of Mr. Yu's life in Korea, compelled Yu to engage in this aberrant action. Traditionally in Korea an agent of the government, who in fact receives little in pay, is expected to receive an honorarium in these circumstances especially where the government agent forms a relationship with or befriends the citizen. It would have been in fact an insult for Mr. Yu not to have paid the agent, and in addition, the befriending of Yu such as the discussions of other matters and the meals together played into this cultural motivation. No wonder so many prominent Korean Americans in this sting operation reacted in the same way as Mr. Yu to this conduct.

In addition as in *Takai* "it seems entirely appropriate for outstanding good deeds to be considered as a relevant factor in determining whether his criminal conduct was a single aberrant act." *Id.* at 1433.

As in *Takai* the specific factors "converge to constitute a unique mitigating circumstance." *Id.* at 1434. The Third Circuit has rejected totality of circumstances. Other Circuits have accepted same. Cultural differences standing alone may as in the cases above

justify a downward departure. In the alternative cultural differences in the context of totality of circumstances may justify a downward departure. Certainly Mr. Yu, who had a stronger case than the defendants in the above cases should have been given his day in court as to sentencing.

II.

FOR SENTENCING PURPOSES, CULTURAL DIFFERENCES ARE DIFFERENT AND DISTINCT FROM NATIONAL ORIGIN, AND AS SUCH CAN BE CONSIDERED BY A SENTENCING COURT IN EXERCISING PROPER DISCRETION AT SENTENCING.

United States Sentencing Guidelines, § 5H1.10 states that race, national origin, creed, religion and socio-economic status are not relevant in the determination of a sentence.

The District Court reasoned that it could not depart from the sentencing guideline range because U.S.S.G. § 5H1.10 subsumes cultural differences in its treatment of national origin. The majority opinion did not address this issue. The dissent, however, concluded after a detailed review, that cultural differences are not subsumed by the category of national origin and are thus proper factors for sentencing consideration.

In reaching this conclusion, the dissent analyzed legislative history.

> The legislative history of the statute at best suggests that Congress meant for the Commission to adopt an Equal Protection-style guideline, but as to which characteristics are forbidden considerations, it tells us no more than the plain language of the Guideline. And if we must take a plain language

> view of the matter, it seems plain to me that cultural and national origin distinctions are not the same. Many Chicanos are American-born but have no noticeable cultural differences. I know of no case holding that cultural differences are equivalent to distinctions based on national origin.

United States v. Jung Yul Yu, *supra* at 16 (dissenting opinion of Judge Becker).

Furthermore, the *Big Crow* Court addressed this same issue and held that cultural differences are not barred from consideration at sentencing. In support thereof, the Court quoted the following language:

> A policy statement in the guidelines states that race, national origin and socioeconomic status are not relevant in determination of a sentence . . . Commentators note, however, that the legislative history suggests that the use of the phrase "are not relevant" may be too sweeping because the Senate Judiciary Committee's report states that the requirement of neutrality . . . is not a requirement of blindness."

United States v. Big Crow, *supra* at 1332, n. 3 (further citation omitted).

III.

EVEN IF THE CIRCUMSTANCES WERE NOT SUFFICIENTLY UNUSUAL, UNIQUE OR EXTRAORDINARY, OR IF § 5H or § 5K ELIMINATED CERTAIN FACTORS FROM CONSIDERATION, THE DISTRICT COURT STILL HAD THE DISCRETION TO DEPART BECAUSE § 5H AND § 5K ARE POLICY STATEMENTS AND NOT BINDING GUIDELINES.

The primary statute which directs federal sentencing, 18 U.S.C. § 3553, requires sentencing courts to consider seven factors in determining the particular sentence to impose. One of those factors is "any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1)." *See* 18 U.S.C. § 3553(a)(4). In other words, Congress distinguished between policy statements and guidelines and directed that both be considered by sentencing courts. However, guidelines are given the controlling weight because § 3553(b) directs the sentencing court, after considering the seven factors in § 3553(a), to impose a sentence "of the kind, and within the range" set forth in the guidelines. The court is permitted to depart from a guideline range sentence when it finds an aggravating or mitigating circumstance "of a kind, or to a degree" not adequately considered by the Commission that should result in a different sentence. *See* 18 U.S.C. § 3553(b). In determining whether a circumstance has been adequately considered the court is limited to the "guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* Again, guidelines are distinguished from policy statements.

Congress also distinguished between guidelines and policy statements in the enabling legislation. *See, e.g.*, 28 U.S.C. § 994(a)(1) (Sentencing Commission to promulgate guidelines to determine sentences); 28 U.S.C. § 994(a)(2) (Sentencing

Commission to promulgate policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation); 28 U.S.C. § 994(a)(3) (Sentencing Commission to promulgate guidelines or policy statements regarding probation revocation and modification or revocation of supervised release). The requirement does not apply to policy statements. Consequently, Congress can reject or modify guidelines but not policy statements. *Id.* This accountability to Congress was a factor in the Supreme Court's resolution of the separation of powers issues raised regarding the location of the Sentencing Commission. *Mistretta v. United States*, 488 U.S. 647, 109 S. Ct. 647, 666 (1989).

There is no "guideline" defining "policy statement". The guidelines do provide that commentary that suggests circumstances which may warrant departure is to be treated as the legal equivalent of a policy statement. *See* § 1B1.7 (1987-1990). The same guideline provides that "as with a policy statement", commentary that provides background information may provide guidance in assessing the reasonableness of departures. *Id.* However, with the November 1, 1990 amendments to Chapter Seven of the guidelines (violation of probation and supervised release), the Sentencing Commission provided insight into this distinction between guidelines and policy statements. In the introduction to Chapter Seven, the Commission explained that it chose to promulgate policy statements rather than guidelines because such "provided greater flexibility to both the Commission and the courts." *See* § 7A3(a) (1990), page 7.2. The Commission noted two differences: first, policy statements are not subject to the May 1 statutory deadline for submission of guidelines to Congress and therefore they provide the Commission additional time to consider issues; and second, the policy statement option has greater flexibility and provides opportunities for evaluation by both the courts and the Commission." *Id.* With regard to probation and supervised release decisions, the Commission preferred the "policy statement option" because of its greater flexibility. The Commission stated its intent

to promulgate revocation guidelines after an adequate period of evaluation. *Id.*

The distinction between guidelines and policy statements is an open issue. The Fifth Circuit has found that as a policy statement § 5K1.1 (substantial assistance) is not binding on the District Courts. *See United States v. White*, 869 F.2d 822, 869 (5th Cir. 1989). A District Court in Iowa's Northern District found § 5K1.1 not binding because it was labeled as a policy statement. *See United States v. Gutierrez*, 908 F.2d 349, 350, 351 (8th Cir. 1990), judgment vacated 9/26/90. A three judge panel of the Eighth Circuit with one dissent reversed finding the policy statement of § 5K1.1 binding law. *Id.* But then an equally-divided en banc Eighth Circuit affirmed the District Court. *See United States v. Gutierrez*, 917 F.2d 379 (8th Cir. 1990). The Seventh Circuit has stated:

> Courts may depart if the Sentencing Commission did not adequately consider a circumstance, 18 U.S.C. § 3553(b), and it may be that by writing a policy statement rather than a guideline the Commission has signalled that it does not think its treatment definitive.

See also, United States v. Bayles, 923 F.2d 70, 71 (7th Cir. 1991).

Even though the Sentencing Commission has issued a guideline manual yearly since 1987, with amendments in January 1988, June 1988, October 1988, November 1989, and November 1990, the provisions regarding offender characteristics and departures have always been policy statements. In other words, the Commission has never issued binding guidelines restricting the use of offender characteristics or departures. The absence of binding guidelines restricting consideration of offender characteristics, or restricting consideration of various departure

grounds cannot be attributed to inadvertence by the Commission. As a result, a sentencing court can continue to consider offender characteristics even if they are not extraordinary in a given case.

Although a sentencing court may consider policy statements as one of seven sentencing factors, it is not controlled by them. It is the guidelines and not the policy statements that § 3353(b) requires a court to follow absent appropriate grounds for departure. Policy statements may reflect what consideration the Commission has given to a particular factor but cannot eliminate the discretion of the sentencing judge to consider that factor. Only binding guidelines control the judge's discretion and then only to the extent that there exists no aggravating or mitigating circumstances "of a kind, or to a degree" not adequately considered by the guidelines.

As discussed above, the relevant "offender characteristics" in Yu's case were not "ordinary" and would provide grounds for a downward departure even if § 5H1.3 and § 5H1.6 were binding guidelines. However, the failure of the sentencing judge to recognize that he had the discretion to depart in these circumstances is compounded by the fact that these sections are non-binding policy statements and not guidelines or binding.

The deliberate action of the Sentencing Commission in continuing to deal with offender characteristics (§ 5H) and the factors that might give rise to departure (§ 5K) as policy statements must be recognized for what it is—a mechanism to provide discretion. If the guidelines were mandatory they would not have been called guidelines.

IV.

THE COURT OF APPEALS ERRED IN FAILING TO REMAND FOR RESENTENCING AND BY RESOLVING A DISPUTED FACTUAL ISSUE.

It is clear from the record that the trial judge wished to hear evidence regarding the issue of cultural differences, but declined to do so because he thought that he did not have the power to consider it.

> But in view of my power under the Sentencing Guidelines, it (the proposed testimony, evidence and argument) would be irrelevant. If the Court of Appeals says that it is wrong, then we will all be back here for a determination as to whether in this case, I would exercise that power, a matter on which I express no opinion whatsever.

(Sentencing Hearing 56a-57a, 66a-68a, 70a).

The dissent honored the trial judge's wishes in that it would remand to allow the trial judge to hear the evidence and resolve same either in favor of or against petitioner.

The learned dissent is correct in this case.

> The majority declines to confront the question of whether USSG, section 5H1.10 prohibits consideration of cultural differences. It affirms the sentence on the ground that even if cultural differences may be considered, the district court would have abused its discretion to depart on these facts. I believe that reaching the question whether cultural differences may be considered in

> sentencing is necessary because, as I discuss below, the record is not factually settled, as the majority implies. [Opinion, 12a].
>
> I strongly suspect that the district judge would find that despite Korean practices and Yu's cultural differences, Yu knew or should have known that what he was doing was wrong and therefore is not entitled to a downward departure. But I would leave fact finding and the decision whether to depart up to the district court in the first instance. Under the current sentencing regime, the district courts, not the courts of appeals are charged with finding facts and making the primary decision whether a departure is appropriate. If the district court exercises its discretion to depart, this court can review for abuse of discretion . . . Either way, however, the district court should have the opportunity to exercise its discretion. [Opinion, 21a].

The majority ruled that even though the trial judge could have heard the evidence and testimony, the court would have abused its discretion if it had departed downward in this case. The problem with this reasoning is that no one ever heard the evidence.

The majority emphasized counsel's refusal to answer their question as to whether at the time of the bribes Yu did not understand whether his actions violated the laws of the United States (Opinion, 12a). Primarily, counsel had never asked his client that question. Secondly, counsel interpreted the question as to what was in Yu's heart at the time of the incident which counsel would have no way of knowing. Finally, the question appears to equate the issue of whether factors make a case unique enough

to justify a downward departure with the standard for an insanity defense. Petitioner is not contending non-guilt due to cultural differences, rather he is contending that his case is sufficiently unique to justify consideration of cultural differences which could warrant a downward departure. The Court of Appeals without hearing any evidence and knowing that Yu's evidence was not allowed in the District Court speculated that the testimony and evidence would not have swayed the trial judge. That is neither justice nor the appearance of justice. Mr. Yu justifiably believes that he did not have his day in court. We agree. Whether Yu's evidence would prevail must be decided by a trial judge who has heard the evidence. This did not occur in the instant case.

CONCLUSION

For the foregoing reasons, Jung Yul Yu requests that this Honorable Court grant his petition for writ of certiorari, thereby vacating his sentence and remanding this matter to the District Court for a hearing on the evidence and resentencing.

Respectfully submitted,

VAL PLEET WILSON
ARNOLD R. SILVERSTEIN
WILSON & SILVERSTEIN
Attorneys for Petitioner

APPENDIX A — ORDER OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1436

UNITED STATES OF AMERICA,

v.

JUNG YUL YU,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Criminal No. 90-451-01)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and GARTH, *Circuit Judges*

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the

Appendix A

petition for rehearing is denied.

BY THE COURT,

s/ Martin Greenberg
Circuit Judge

DATED: FEB 24 1992

APPENDIX B — OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 28, 1992

Filed January 28, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1436

UNITES STATES OF AMERICA

v.

JUNG YUL YU,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Criminal No. 90-451-01)

Argued December 10, 1991

BEFORE: BECKER, GREENBERG, and GARTH,
Circuit Judges

(Filed January 28, 1992)

Arnold R. Silverstein (Argued)
Val P. Wilson (Argued)
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Appendix B

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Assistant U.S. Attorney
Walter S. Batty, Jr.
Assistant U.S. Attorney
Chief of Appeals
Michael M. Baylson
United States Attorney
601 Market Street
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Attorneys for Appellee

OPINION OF THE COURT

Greenberg, *Circuit Judge*.

Appellant Jung Yul Yu appeals from a judgment of conviction and sentence entered on May 16, 1991, sentencing him to ten months imprisonment on his plea of guilty to two counts of bribery of a public official, in violation of 18 U.S.C. § 201(b)(1)(A). The judgment provided that five months of the sentence could be served in home confinement with work release and church attendance privileges. This appeal raises questions regarding the power of the district court to depart downward from the range provided by the Sentencing Guidelines by reason of claimed cultural differences between Korea, Yu's country of origin, and the United States.

The essential facts are not in dispute. Yu was born in Korea in 1931 and was graduated from law school there. While in Korea he worked for what his attorney characterizes as the Korean equivalent of the Internal Revenue Service. In 1976, when he was 46 years old, he immigrated to the United States with his wife

and four children, and he has become a naturalized citizen.[1] His children have received college educations in this country. Yu took some courses at Temple University and subsequently obtained a doctorate degree through a correspondence course at another institution. He is referred to as "Dr.", apparently on the basis of either that degree or one earned in Korea. Upon his arrival in the United States, Yu worked in a factory, but in 1980 he opened an accounting office which he describes in his brief as a "tax preparation business." He seems to have been financially successful, as the presentence report shows that he owns three properties, all with substantial equities above mortgage debt.

Between August 1988 and May 1989, during an audit of Yu's and his wife's joint tax return, which was tape recorded without Yu's knowledge, Yu made certain small payments to the examining agent for the agent's own use, one payment being $250. Ultimately, he was advised that he owed $27,000 in tax deficiencies and penalties. Yu attempted to take care of this problem by paying the agent $5,000, for which he received a no-change letter. He was indicted for bribery for making the $250 and $5,000 payments.

Yu's adjusted offense level was 14 and, inasmuch as the court allowed him a 2-level adjustment for acceptance of responsibility, his total offense level was 12. Thus, as his criminal history category was I, his guideline range was 10 to 16 months.

At sentencing Yu urged the district court to depart downward from that range because of cultural differences between the United

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1. The presentence report does not indicate that he was naturalized but the assistant United States attorney made that representation at the sentencing and was not contradicted by Yu's attorney. App. at 55.

States and Korea. He seemed to view this case as thereby involving a mitigating circumstance not adequately considered by the Sentencing Commission in formulating the guidelines. *See* 18 U.S.C. § 3553(b). In support of this contention he made an offer of proof that, based on his Korean experience, he considered the bribe as an honorarium and that it could be viewed as an insult not to offer the payment. He further urged that the plea agreement itself authorized a downward departure. On the other hand, the government contended that, while there might be cultural differences between the United States and Korea, in view of his long residency in this country Yu could not reasonably rely on his Korean background for a departure. Furthermore, the government regarded Yu's contention as barred by Sentencing Guidelines § 5A1.10 which indicates that "national origin" is not relevant in the determination of a sentence. The district court held that it did not have the power to depart downward but sentenced Yu at the bottom of the applicable range, emphasizing that in refusing to depart it was not exercising discretion. Rather, the distraict court stated: "just so that it's clear I'm not exercising any discretion not to use a power that I have. I'm holding that I lack the power." Yu appeals and we have jurisdiction under 18 U.S.C. § 3742(a)(2).

On this appeal Yu repeats his argument that the cultural differences between Korea and the United States justify the downward departure. While he recognizes that section 5H1.10 provides that "national origin" is not relevant in the determination of a sentence, he urges that this guideline is a non-binding policy statement which, in any event, does not exclude a downward departure on the basis of culture, a factor he regards as distinct from national origin. He further contends that he is elderly and frail and would face danger in prison and that by reason of the publication of his name in Korean and English language

newspapers he has "suffered a great loss of face." He finally urges that since his plea agreement provides that the court "*may* impose any sentence authorized by law, including a sentence that departs from any applicable sentencing guideline range" the district court had the power to depart downward. The government contends that the guideline is binding and precludes downward departure on the basis of Yu's place of national origin which is what it believes he is seeking. It also contends that the plea agreement did not authorize a downward departure, as it simply acknowledged that any lawful sentence could be imposed.

If we decided this case by determining whether the Sentencing Commission adequately took into consideration the circumstances which Yu has advanced for departure, *see* 18 U.S.C. § 3553(b), we would undoubtedly exercise plenary review. *United States v. Medeiros*, 884 F.2d 75, 78 (3d Cir. 1989); *United Sttates v. Uca*, 867 F.2d 783, 786 (3d Cir. 1989); *United States v. Ryan*, 866 F.2d 604,, 410 (3d Cir. 1989). However, we see no need to make such a plenary construction of the guidelines, for it is perfectly clear for the reasons we explain below that the district court would have abused its discretion if it had departed downward in this case. Thus, we prefer to leave to another day the question of whether a foreign culture is subsumed within the term "national origin," a factor which the Sentencing Commission, faithful to its congressional mandate, 28 U.S.C. § 994(d), has deemed irrelevant in the determination of a sentence.

Hence, we do not decide that "national origin," as that term appears in the Sentencing Guidelines, includes within it any and all cultural differences. Although the concept of sentencing based upon one's culture raises a number of questions as to whether differences in culture within the same society should be, or can be, identified as focal points for sentencing or whether cultural

differences deemed to be a matter for sentencing consideration should be restricted to cultures which are foreign to American shores, we leave those questions to be answered by the Sentencing Commission which Congress has designated to deal with such issues. Suffice it to say, this case does not require resolution of "cultural" v. "natural origin" issues.

Accordingly, as there ws no basis to depart here, we will simply assume without deciding that in some cases the cultural differences between the United States and another country may justify downward departure. Thus, it is conceivable that an unschooled recent immigrant or a foreign traveler might reasonably point to practices in his country of origin that would justify a downward departure on the grounds that while he intended to do the acts for which he was convicted and was thus criminally liable, he did not recognize the extent of his culpability in this country.[2] But this is not such a case. While Yu points to his Korean origin as the source of his cultural values, he never contended in the district court that at the time of the bribes in this case he did not understand that his actions violated his laws. This point was not lost on us when we examined the record and thus at oral argument we directly asked whether Yu contended that, at the time of the offenses, he thought his conduct in bribing the agent was consistent with the culture of this country. We did not receive an affirmative response.[3]

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2. Actually it is doubtful at best that cultural differences are allowable under the guidelines, even if it would appear to be reasonable to depart on that basis in a particular case. *See United States v. Natal-Rivera*, 879 F.2d 391 (8th Cir. 1989).

3. While the dissent suggests that there is a disputed factual issue regarding whether or not Yu knew that in this country bribing of revenue agents is not

(Cont'd)

Of course, this is hardly surprising. Yu had been in this country for about 12 years and was a naturalized citizen when he committed the offenses. He was a professional tax preparer who had accumulated property and accordingly had at lease some familiarity with United States laws. In addition, he had some college-level and legal education in this country and had been well educated in Korea. Indeed, he almost admits that he had no reason to believe that the culture in this country countenanced the bribery of IRS agents. He implicitly demonstrates this by pointing out that when he sought to cooperate with the government to encourage it to move for downward departure pursuant to Sentencing Guidelines § 5K1.1,[4] he was unsuccessful for, as he explains in his brief, he could not cooperate with the government because he had no criminal associates. Accordingly, Yu contends that he "was not able to provide the government with any valuable information." Brief at 18. He then, in effect, reiterates that he knew the American way, and indeed usually lived by it, describing his own conduct as a single act "of aberrant behavior." The fact is that insofar as we can ascertain from the record, Yu has been

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(Cont'd)

tolerated, and further suggests that we resolved the matter against him by our inquiry at oral argument, this is not so. Our inquiry at oral argument simply confirmed our understanding of the record that Yu never contended in the district court that he did not understand that he was violating the law. Thus, there cannot possibly be a dispute of fact on the issue of Yu's knowledge of the law and we need not remand the matter to see if Yu can prove a contention he has never made.

4. § 5K1.1. *Substantial Assistance to Authorities* (Policy Statement)

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation of prosecution of another person who has committed an offense, the court may depart from the guidelines.

a model citizen except for the conduct which led to these proceedings. In the circumstances, there is no basis to avoid the obvious conclusion that Yu was motivated to offer a $5,000 bribe to avoid a $27,000 tax liability by a desire to save $22,000, rather than by his belief that he was culturally bound to make the offer.[5] The bottom line is that, while immigrants lawfully entering the United States are welcome to bring their cultures with them, the aspect of a culture which justifies the bribing of federal agents must be left abroad.[6]

Some of Yu's other arguments were not raised in the district court and thus to that extent have not been preserved and in any event are without merit. *See United States v. Batka*, 916 F.2d 118, 120 (3d Cir. 1990). There is no reason to conclude that Yu cannot be adequately protected for the short time he will be in actual custody. Furthermore, the shame which he has felt upon conviction from a few newspaper articles does not differ in

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5. While we reach our result on an abuse of discretion analysis, we point out that the same result might well be reached by a plenary conclusion that a downward departure can never be justified on the basis of the defendant's cultural background when the defendant understood the culture of this country. *See United States v. Medeiros*, 884 F.2d at 78. This plenary analysis, of course, would be different than ascertaining whether cultural differences are subsumed within the term "national origin." It is, however, not necessary to make this plenary determination as the downward departure could not be sustained even on a deferential standard of review.

6. The parties have cited a number of other cases implicating the culture differences issue. *See United States v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990); *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990); *United States v. Natal-Rivera*, 879 F.2d 391 (8th Cir. 1989). However, we see no profit in discussing them as none formulates an overeaching principle that we could follow to resolve this case, which is obviously dependent upon its particular facts.

character from that felt by many otherwise law-abiding persons upon being criminally convicted. Finally, we construe the plea agreement, which recognizes the court's right to depart from the applicable sentencing range, simply to mean that the court can impose a sentence authorized by law and the guidelines. This standard language does nothing more than preclude a defendant from claiming surprise if the court departs from the guidelines range and certainly could not be the basis to jettison the guidelines.

The judgment of conviction and sentence of May 16, 1991, will be affirmed.

Appendix B

BECKER, *Circuit Judge*, dissenting.

Based on his traditional Korean cultural background, the defendant Yu sought a downward departure from the otherwise applicable sentencing range. United States Sentencing Guideline ("USSG") § 5H1.10 expressly prohibits taking race, national origin, and socioeconomic status into account in sentencing. The district court held that it could not legally depart from the sentencing range because USSG § 5H1.10 subsumes cultural differences in its treatment of national origin, and hence implicitly prohibits taking cultural differences into account during sentencing. The government endorses this position.

The majority declines to confront the question whether USSG § 5H1.10 prohibits consideration of cultural differences. It affirms the sentence on the ground that even if cultural differences may be considered, the district court would have abused its discretion to depart on these facts. I believe that reaching the question whether cultural differences may be considered in sentencing is necessary because, as I discuss below, the record is not factually settled, as the majority implies.[1] I therefore turn to the scope of USSG § 5H.10.

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1. Even if the majority were correct on its view of the facts, and therefore correct that departure (if permissible) would have been an abuse of discretion, I do not believe that it should have avoided the logically prior issue of Guideline construction. In my view, the normally salutary principle of judicial restraint does not apply with full force to determinations of the scope of particular Guidelines. In particular, the success of the Guidelines system depends on judges pointing out to the Commission potential grounds for departure that it was not considered.

The Guidelines were meant to evolve. See 28 USC § 991(b)(1), (2) (1988)

(Cont'd)

Appendix B

I. PROPER CONSTRUCTION OF USSG § 5H1.10

A. *Nature of the Inquiry*

In a world without sentencing guidelines, a sentencing court might consider a defendant's different cultural background relevant to the appropriate sentence. The majority itself gives the example of a visitor or recent immigrant from a foreign land who, although intending to commit an act that is a crime in this country, did not intend to break the law here because the practice was customary (and presumably legal) in his or her homeland. Of course, ignorance of American law is not an excuse for criminal conduct, but it might be considered a mitigating factor at sentencing for at least two reasons. First, the defendant's conduct may be more understandable than that of someone who grew up in this country: the defendant may have had little reason to know better. Second, the defendant might be less likely than an ordinary

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(Cont'd)

(Commission not only to develop initial guidelines, but also to evaluate them on an ongoing basis); 28 USC § 994(o), (p) (1988) (Commission required to review guidelines periodically and empowered to submit amendments to Congress). The evolution does not simply involve the Commission and Congress; the courts are essential players as well, especially in the area of departures. Indeed, the Commission's basic policy on departures recognizes the need for a dialogue bet ween the Commission and the courts. See USSG ch 1, pt A, ¶ 4(b) (Commission to monitor departures to determine how to refine Guidelines). The Commission constantly invites judicial comment on problem areas in the Guidelines.

I do not suggest that courts should decide Guidelines issues not well presented by the cases in front of them. I only suggest that courts should not avoid deciding issues of Guidelines interpretation that are squarely presented.

offender to repeat his or her offense.[2]

One can easily come up with other examples, but the basic (and I believe uncontroversial) point is that cultural differences are sometimes logically relevant to determining a proper sentence. The government does not controvert that point; rather its position is that the Sentencing Commission has declared cultural differences *legally irrelevant*. The Guidelines certainly do not affirmatively approve taking cultural differences into account ass a basis for either an offense level adjustment or a departure. The question is thus whether the Sentencing Commission failed to consider cultural differences at all (in which case cultural differences may be a proper basis for departure) or did consider them and rejected their use (in which case departure based on cultural differences is legally forbidden).

That is the approach mandated by 18 USC § 3553(b) (1988), which provides that courts shall impose sentences within the Guideline ranges "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission . . . that should result in a sentence" outside the range normally indicated by the Guidelines. See also 28 USC § 991(b)(1)(B) (1988) (similar language). The *only* sources to which a court may look to determine whether the Commission adequately tok a circumstance into consideration are the Guidelines themselves and official Policy Statements and Commentary from the

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2. I agree with the implicit premise of the majority opinion that a defendant who is or should be familiar with this country's laws and traditions may not invoke ignorance based on the cultural differences of his or her nation of origin to obtain a reduced sentence. In such a case, the defendant would have reason to know better and is no less likely a candidate for recidivism.

Sentencing Commission itself. 18 USC § 3553(b).

It is also important to emphasize what this inquiry does not entail. Our job in interpreting this Guideline is *not* to decide whether departures on the ground of cultural differences are good or bad in general. Certainly one can envision a parade of horribles that might follow if courts readily granted such departures. But there are three answers to that concern. First, our role in the evolutionary process is solely to decide what the Sentencing Commission did or did not take into account in the Guidelines, not to guess what it or Congress would do if presented with these arguments. Second, as I will explain below, even under current law, only some sorts of cultural differences can ever justify a departure. Third, even within that narrow category, actual departures will be rare. To hold that the courts have the power to depart on the basis of some cultural differences is not to say that they should or must on the facts of any particular case. A district court is always free to refuse to depart (a decision that this court has held is not subject to appellate review, *United States v Denardi*, 892 F2d 269 (3d Cir 1989)), and if the district court does depart, the courts of appeals have the power to reverse the departure as an abuse of discretion. In sum, the parade of horribles is not only irrelevant to our inquiry, but would not happen in any event.

B. *Cultural Differences as a Basis for Departure*

In deciding which types of cultural differences the Commission took into account in USSG § 5H1.10, the place to start is the text of the Guideline itself. It provides:

Appendix B

§ 5H1.10

Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status

These factors are not relevant in the determination of a sentence.

Two things are worth noting about the Guideline, First, technically it is not a Guideline at all, but a Policy Statement. Contrary to Yu's protestations, however, that makes no difference to our inquiry. As noted above, in 18 USC § 3553(b), Congress told the courts to consider Policy Statements and official Commentary as well as full-fledged Sentencing Guidelines in determining whether the Commission adequately took a circumstance into consideration.

Second, USSG § 5H1.10 is an absolute prohibition against taking the listed factors into consideration. Other 5H1 Policy Statements provide that other factors, such as military service, family ties, employment record, and physical and mental conditions are not *ordinarily* relevant in sentencing. See generally USSG ch 5, pt H. In extremely unusual cases, those factors may justify a departure, but in no circumstances may a court *ever* depart based on race, sex, national origin, creed, religion or socioeconomic status. See also USSG § 5H1.4 (drug or alcohol dependence never a reason to depart downward); USSG § 5K1.12 (economic hardship and personal financial difficulties as causes for crime do not warrant sentence decrease).

The government's position is that "cultural differences" is shorthand for distinctions based on national origin. The government offers no legislative history of USSG § 5H1.10 to support such a broad interpretation of "national origin," and I have found none. USSG § 5H1.10 has no legislative history,

but it was undoubtedly based on Congress's statutory directive in 28 USC § 994(d), the last sentence of which reads: "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." We might assume that the Commission meant to carry over Congress's intent, but even if so, the legislative history of that portion of subsection 994(d) is very sparse.

The Senate Report merely quotes the language enacted and explains:

> The Committee added the provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.

S Rep No 98-225, 98th Cong, 1st Sess 171 (1983), in 1984 USCCAN 3182, 3354. The legislative history of the statute at best suggests that Congress meant for the Commission to adopt an Equal Protection-style Guideline,[3] but as to which characteristics are

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3. The Report added in a footnote:

> The requirement of neutrality with regard to such factors is not a requirement of blindness. In sentencing a person to imprisonment it would be appropriate to have a judge

(Cont'd)

forbidden considerations, it tells us no more than the plain language of the Guideline.

And if we must take a plain language view of the matter, it seems plain to me that cultural and national origin distinctions are not the same. Many Chicanos are American-born but have a distinct culture. A foreign-born person may have moved here as a child and have no noticeable cultural differences. I know of no case holding that cultural differences are equivalent to distinctions based on national origin.[4]

But cultural differences are, of course, sometimes linked to national origin (and to race and socioeconomic background as well). Therefore "cultural differences" no further defined is too broad a basis for departure; the legality of departure depends

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(Cont'd)

> consider, for example, recommending placement in an institution equipped to accommodate the regligious dietary laws followed by the defendant, or an institution housing prisoners of the defendant's sex.

Id at 171 n409, 1984 USCCAN at 3354 n409. This too seems consistent with an Equal Protection interpretation.

4. In *United States v. Natal-Rivera*, 879 F2d 391 (8th Cir 1989), the court did affirm the district court's refusal to take into account the alleged socialization of a Puerto Rican woman to follow here husband's commands. But Natal-Rivera herself argued that USSG § 5H1.10 equated national origin and cultural differences; her argument was that the Guideline violated due process for that reason. The court did not have to analyze whether the equation was true; it merely assumed that was so and went on to say why such a rule is constitutionally permissible. I too have no doubt that the Commission could constitutionally adopt a Guideline banning consideration of cultural differences, but that is not the question here.

on the *type* of cultural difference. USSG § 5H1.10 in fact rules out consideration of many cultural differences. For example, if a "cultural differences" claim is really a claim for special treatment based on ethnicity, it must be denied. Thus an African-American defendant may not receive a downward departure because he or she has suffered from society's historical discrimination against African-Americans and their culture. See *United States v Prestemon*, 929 F2d 1275 (8th Cir 1991) (no departure for biracial defendant). If a "cultural differences" claim is a surrogate for an alcohol-related excuse, it must fall because USSG § 5H1.4 specifically refuses to allow abuse of alcohol to reduce culpability. See *United States v Lowden*, 905 F2d 1448 (10th Cir 1990) (no departure allowed based on the prevalence of alcohol abuse on Indian reservations). Similarly a court may never grant a departure on a claim that most people with the defendant's cultural background grow up in poverty, because USSG § 5K1.10 says that socioeconomic status may not be considered in sentencing.

Therefore, a sentencing court must break down a "cultural differences" claim to determine the true basis on which a departure is sought. Then the court must determine how the Guidelines treat that true basis. For example, if a defendant seeks a departure nominally based on "cultural differences" that is in reality based on personal characteristics of the sort listed in USSG §§ 5H1.1 to 5H1.6 and 5H1.11, departure is ordinarily (but not always) improper because the Commission has said in those Guidelines that those factors "are not ordinarily relevant" in departure determinations. See *United States v Rodriquez*, 882 F2d 1059 (6th Cir 1989) (inability to speak English immaterial to sentence). But see *United States v Big Crow*, 898 F2d 1326 (8th Cir 1990) (downward departure for Indian defendant approved in extraordinary case).

Appendix B

Most relevant here, if a defendant seeks a departure based on excusable ignorance of American cultural norms that led to his or her criminal conduct, I know of nothing in any Guideline, Policy Statement or official Commentary that forecloses departure on that basis. Nor do I know of any Guideline, Policy Statement or official Commentary that forecloses arguments that the defendant deserves a lesser sentence because he or she will receive extraordinary informal punishment in his or her ethnic community, although Yu may have raised this for the first time on appeal so that this argument may not be properly before us.[5] Under 18 USC § 3553(b), those sorts of cultural differences are therefore not "adequately taken into consideration" by the Guidelines, and therefore may, in some cases, form the basis for a departure. Of course, in most cases, departures on these grounds will be and should not be granted, but (for now at least) the Guidelines do not categorically foreclose such departures.[6]

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5. Presumably courts would grant requests for departure based on punishment outside of the legal system only extremely rarely. The only such departure of which I am aware is the extraordinarary case of former United States District Judge Robert Aguilar who received a downward departure because the revelation that he accepted bribes was leading to protracted nonjudicial proceedings that were expected to cultimate in his removal from office. *See United States v. Aguilar*, Cr No. 89-0365 (ND Cal 1990) (transcript of November 1, 1990 sentencing hearing). As the district judge recognized in *Aguilar*, however, convictions typically lead to social ignominy and professional ruination. Obviously most offenders' convictions significantly sully their reputations with their friends, neighbors, and colleagues. Their business relations may suffer as well. Thus only the most unusual cases of extralegal punishment, whether culturally related or not, could warrant departure.

6. Because the issue of cultural differences is recurring and involves difficult policy questions, I hope that the opinions in this case will spur the Commission

(Cont'd)

Appendix B

II. THE PROPER RESULT ON THIS FACTUAL RECORD

In support of his contention that cultural differences justified a downward departure in his case, Yu proffered testimony of witnesses that he is a traditional Korean; that in Korea, where he lived most of his life, citizens frequently give underpaid government bureaucrats something under the table; and that failure to give such an "honorarium" is considered an insult. I have no idea whether that is true, and the district court refused to permit Yu's witnesses to testify to that effect, believing that USSG § 5H1.10 made that evidence immaterial because the court could not depart on the suggested ground. But Yu's evidence, if credited, would tend to show that he did not know that bribing an IRS agent was a bad thing to do, which is not a prohibited ground of departure.

For the very reasons that the majority gives, I too suspect that Yu, a tax preparer who has lived in this country for many years, either knew or should have known that the United States does not tolerate taxpayers bribing tax collectors. But unlike the majority, I view that question as a disputed fact. At oral argument, Yu's counsel was asked whether Yu really believed that his conduct was consistent with American norms. The majority notes that "[w]e did not receive an affirmative response," which is true. But neither did we receive a negative response; his attorney simply did not know or was unwilling to say.

I strongly suspect that the district judge would find that

(Cont'd)

to consider it. To clear up the confusion in the courts, the Commission should adopt a specific Policy Statement on the subject or make clear in some other way when, if ever, factors related to cultural differences may be grounds for departure.

despite Korean practices and Yu's cultural differences, Yu knew or should have known that what he was doing was wrong and therefore is not entitled to a downward departure. But I would leave the factfinding and the decision whether to depart up to the district court in the first instance. Under the current sentencing regime, the district courts, not the courts of appeals, are charged with finding facts and making the primary decision whether a departure is appropriate. If the district court exercises its discretion to depart, this court can review for abuse of discretion. If the district court declines to exercise its discretion to depart, this court has no jurisdiction to review that decision. *United States v. Denardi*, 892 F2d 269 (3d Cir 1989). Either way, however, the district court should have the opportunity to exercise its discretion.

In sum, because the Sentencing Commission has not (thus far) foreclosed departure on grounds of this sort of cultural difference, and because the district court should have the opportunity to evaluate the evidence and exercise its discretion to decide whether to depart, I would vacate the judgment of sentence and remand for resentencing. I therefore respectfully dissent.

A True Copy:

Test:

Clerk of the United States Court of Appeals
for the Third Circuit

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APPENDIX C — JUDGMENT OF UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA DATED MAY 16, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case No. 90-00451

UNITED STATES OF AMERICA

V.

JUNG YUL YU

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Defendant's Attorney: *Val Pleet Wilson, Esq.*

THE DEFENDANT:

X pleaded guilty to count(s) *one and two.*

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: *18:201(b)(1)(A)*

Nature of Offense: *Bribery of a public official*

Date Offense Concluded: *5-10-89*

Count Number(s): *1 & 2*

Appendix C

The defendant is sentenced as provided in pages 2 through *5* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X It is ordered that the defendant shall pay a special assessment of *$100.00*, for count(s) *one and two*.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
194-56-8294

Defendant's Date of Birth:
July 28, 1931

Defendant's Mailing Address:
1703 Edgehill Road
Abington, PA 19001

Defendant's Residence Address:
same as above

May 15, 1991
Dated of Imposition of Sentence

s/ T.N. O'Neill
Signature of Judicial Officer

THOMAS N. O'NEILL, JR., J.
Name & Title of Judicial Officer

May 16, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 10 months as to Counts 1 and 2, second five (5) months of which may be served in home confinement with work release privileges

and ability to attend church and any other terms that the Court may subsequently approve upon application.

The court makes the following recommendations to the Bureau of Prisons:

X The defendant shall surrender to the United States marshal for this district, on *Mon., July 17, 1991.*

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall not possess a firearm or destructive device.

Additional conditions:

That the defendant observe the standard conditions as adopted by this District;

That the defendant not commit any crimes, federal, state or local;

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That the defendant shall avail the probation office any requested personal or business financial information in a timely fashion.

* * *

The defendant shall pay a fine of *$5,000.00*. The fine includes any costs of incarceration and or supervision.

* * *

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: *12*

Criminal History Category: *I*

Imprisonment Range: *10* to *16* months

Supervised Release Range: *1* to *5* years

Fine Range: *$3,000* to *$30,000*

* * *

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX D — TRANSCRIPT OF SENTENCING HEARING DATED MAY 15, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 90-451-01

Philadelphia, Pennsylvania
May 15, 1991
4:00 o'clock p.m.

UNITED STATES OF AMERICA

V.

JUNG YUL YU

SENTENCING HEARING
BEFORE THE HONORABLE THOMAS J. O'NEILL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Government:

KRISTIN HAYES, ESQUIRE
U.S. Attorney's Office
3310 U.S. Courthouse
Philadelphia, PA 19106

MAUREEN AKERS
U.S. Probation Office
U.S. Courthouse, 9th Floor
601 Market St.
Philadelphia, PA 19106

Appendix D

For the Defendant: VAL PLEET WILSON, ESQUIRE
ARNOLD R. SILVERSTEIN, ESQUIRE
Wilson & Silverstein
2114 Locust Street
Philadelphia, PA 19103

Audio Operator: Patricia Lattanzio

Transcribed by: Leslie Harvey

(Proceeding recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.)

[2] THE COURT: All right, this is the United States of America versus Jung Yul Yu, Number 9451, Mr. Hayes and Mr. Wilson.

MR. HAYES: Good afternoon, your Honor.

MR. WILSON: Good afternoon, your Honor.

THE COURT: All right, who wants to lead off?

MR. WILSON: Your Honor, I have as a preliminary matter a challenge to the addition of four levels for the amount —

THE COURT: Would everyone sit down, please.?

MR. WILSON: — for the amount of the benefit of the bribe and I do have evidence to present on that point. Briefly, your Honor, just so you can put it in context, my argument is that

under the sentencing guidelines the net benefit of the bribe, it's a net benefit and the specific language that I'm relying on, your Honor, is comment two, which is value of the bribe or benefit received, or to be received, in return for the bribe means the greater the value of the bribe or the value of the benefit received, or to be received in return for the bribe, and then the specific language, the value of the benefit received or to be received means the net value as opposed to the gross value of the benefit.

THE COURT: I don't think that means you deduct the amount of the bribe. I really don't, if that's your point, I [3] don't read that language as meaning that.

MR. WILSON: That would be one of my points. The other point, your Honor, of this argument is whether the true value was $26,000. This is a situation where the transcripts show that Mr. Yu said that he would favor the agent if, and the quote was, "If he could make him free." Then the agent went back and at the next meeting, when he was given the $5,000, produced a no change letter because the tax due is calculated in the audit was $26,000. It's my position that "make me free" doesn't necessarily mean "make me free" of this entire tax liability, but "make me free" of this problem. As you can see from the financial statement, this man is not a wealthy man and someone in his financial position that had to come up with $26,000 could be very stressful about things like losing his house and financial realism. And my interpretation of "make me free" is make me free of this stress and this worry about my financial downfall.

THE COURT: Well that's surely legal argument, rather than a matter of evidence.

MR. WILSON: Yes, that part would be legal argument. The

evidentiary part, your Honor, and I have Mitchell Benson, who is a C.P.A., here is that in fact if this order had been challenged that the challenge could have very well been successful. And that really $26,000 wasn't owed, $6,000 of [4] that was penalties and the testimony would be that there is a likelihood that those penalties could have been abated. $20,000 of the income that the Government contends Mr. Yu didn't report, Mr. Yu has always contended and even gave an affidavit signed by someone, to the agent during the audit, that it was in fact a loan from someone. The Government can use that as a self-serving affidavit, but our testimony is that's something that could have been challenged by a qualified accountant, could have gone to Tax Court, and I have testimony on that point.

THE COURT: Yes, well, I'll give you your evidence, I want to get some argument from Ms. Hayes first. What were either the terms of the plea agreement or the charge that you pleaded guilty to?

MR. WILSON: Your Honor, the terms of the plea agreement —

THE COURT: In other words, was there anything about this amount in the indictment to which you entered a guilty plea, or in a plea agreement?

MR. WILSON: Your Honor, in the plea agreement, I assume we pled guilty to the specific facts, and the specific fact is that according to the Government $26,000 was owed. This is more in the nature of a legal theory, that in fact the net benefit really wasn't $26,000 because had he gone about this the proper way —

[5] THE COURT: This is just a question, but it occurs to

me to wonder that if you pled guilty to an indictment charging that you offered a bribe in order to avoid the payment of $26,000 in income tax whether you're not bound by those facts. That's my question.

MR. WILSON: I would submit, your Honor, that we would be allowed to — we certainly couldn't argue that the Government, that in fact the figures on the final audit stated that that $26,000 was owed. We concede that. What we're saying is, when you interpret the guidelines, we're interpreting the benefit as really what the true benefit was, if in fact Mr. Yu had a good argument to challenge the audit. We're certainly not conceding that — we concede that he was told that $26,000 was owed, and that he then gave the payment, said "make me free," and did receive a no change letter. But what we're just saying is that had he properly challenged the order, under the normal course of affairs, that really the true — ironically the true benefit wasn't $26,000, it was something less than $20,000. I think $20,000 is the important figure.

THE COURT: I understand your point and I will hear your evidence if it's necessary. Let me just get Ms. Hayes' point of view now, on this point.

MS. HAYES: Thank you, your Honor. It would be the Government's position that, though we're not trying to [6] preclude the defendant from putting on any evidence that he deems appropriate, that evidence would not be necessary on this point. There was a factual stipulation entered into as part of the plea agreement in this case, that Mr. Yu paid bribes totalling $5,250 to Robert Duffy of the Internal Revenue Service, who is here in return for having Duffy report no change in the defendant's income tax liability. Now, it may be, or it may not be, that had

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Mr. Yu continued contesting the audit he may have been able to have some of the penalties removed. The Government doesn't concede that point, we maintain that the audit was conducted properly and that the numbers that were presented by Mr. Duffy to Mr. Yu were the correct numbers. But, for purposes for this proceeding, what is important is that that is not what Mr. Yu did. He chose not to in any way contest any of the audit results, but to pay a bribe to make the whole thing go away. And he paid $5,000 after being given sheets of paper detailing what Mr. Duffy had found in the audit in setting forth that by Mr. Duffy's calculation what was owed was at least $26,000, and that that consisted of tax and penalties. Mr. Duffy hadn't even added into those numbers at the time they were presented to Mr. Yu any interest. He told him that by his rough calculation as of that point, and as I'm sure your Honor is familiar interest keeps accruing on these matters, there was approximately $5,000 in interest owing [7] which would have raised the number to some $31,000.

So it would be the Government's position that Mr. Yu, by his conduct, waived any challenges to these numbers and he paid $5,000 to the benefit of getting a no change letter after being told he was going to owe in this neighborhood.

THE COURT: What difference would this make to the guideline?

MR. WILSON: I think, your Honor, it's the addition of four levels, by the fact that the Government calculates that the value of the bribe to be in excess of $20,000. So I think it would be the difference between a 12 and a 8, if my understanding is correct.

THE COURT: What does that mean in terms of months?

MR. WILSON: Well, I believe 8, your Honor, would be authorized to give a probationary sentence or a home detention type of sentence, where a 12, your Honor would have to find reason to deviate from the guidelines to do that.

THE COURT: Well, we have 10 to 16 months, that the guideline range, no?

MR. WILSON: Your Honor, that was the first report, there's been a revised report. One of the arguments we made in our motion for departure was that any objection to a 10 was waived, but there's now a revised report which we received, I believe last week, which I believe has the range [8] of — Ms. Hayes will correct me if I'm wrong, with a 12.

MS. HAYES: Your Honor, if I may, I believe that what the report sets out is that the base offense level for the crimes to which Mr. Yu has pled guilty is 14. That's calculated with base offense level of 10 under 2C1.1, which is the bribery guideline, plus 4 for the $26,000 which takes us up to 14. However, Probation took the position and the Government concurs that Mr. Yu is entitled to a two point reduction for acceptance of responsibility, which would take it down to a base offense level of a 12 which dictates a sentence of 10 to 16 months imprisonment.

THE COURT: So that 10 to 16 is the latest figure subject to your argument at this point?

MR. WILSON: Yes, your Honor.

THE COURT: Okay, all right, because 10 to 16 is what I had and what I thought I said to you.

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MS. HAYES: I think Mr. Wilson had — I was just correcting how we got there, not so much what the bottom line was.

THE COURT: All right, all right, all right. Is the Government going to have a recommendation in this case? I forget whether your plea — what your plea agreement entitles you to do.

MS. HAYES: Your Honor, this was a simple open plea in which the Government was free to make whatever [9] recommendation it deemed appropriate. We would request that under all the circumstances, your Honor sentence Mr. Yu on the low end of the guideline range. We think that the Probation Department has correctly calculated the guidelines and there is no reason to depart upwards or downwards that would be justified under the guidelines.

Mr. Yu, to his credit, did plead guilty in this case and he also has met with me and the agent on two different occasions to attempt to cooperate. He has nothing to cooperate on that would allow the Government to file a motion for departure, however he did answer Inspector Hogan's questions about some different issues that had come up during the investigation. I think that's to his credit and based on that we would think that he's entitled to be sentenced at the low end of the guideline range.

THE COURT: All right, I'll see counsel at sidebar, please.

(Sidebar discussion as follows:)

THE COURT: What is the significance, do you agree with counsel's statement of the significance of the word reduction from ten months to eight months?

MS. HAYES: I'm sorry, your Honor, I didn't understand your question.

THE COURT: If I understood counsel to say that if his theory of benefit was accepted that it would reduce the [10] minimum guideline from 10 months to 8 months, but that that would produce certain other consequences. Do you agree with that or not, these other consequences?

MS. WILSON: I would have to double check the guidelines, but I believe it might be that it would reduce the guidelines to a range that — it's my understanding of the guidelines that with a minimum term of imprisonment of 10 months that your Honor would have to order that Mr. Yu serve 5 months in a custodial setting, at least half that minimum term has to be satisfied by custody. We really will dig in our heels about this, your Honor. There is an issue in this case as to whether what Mr. Yu did is one bribe or two bribes under the guidelines. If it were two bribes it would bump it up higher. We've decided in the interest of fairness not to push that that 10 to 16 months seems a fair sentence.

THE COURT: I must say that I'm not too inclined to your theory on this and I can see that it would take on difficulty in a lot of cases.

MR. WILSON: Your Honor, it's my understanding that if you did accept that it would — my understanding if you accepted it without that 4 level increase that you would have authority to do a home detention sentence without deviating.

THE COURT: Well, that's my next question to the United States Attorney was assuming it were 10 months what's the least restrictive setting in which the 5 months could be [11] set, or in

what variety of settings could that 5 months be set?

MS. HAYES: I think, perhaps we could ask the probation officer what that would be because she is here.

THE COURT: Oh, I should have invited her to join us. I'm sorry I always assume that the probation officer knows she's invited, but I forgot to invite — all right. The question was, we have here a theory by the defense, that for reasons that he stated that the basic guidelines should be — minimum guidelines should be 8 months instead of 10. The Government does not agree with that. Now, just focusing, putting that aside for the question and focusing on the 10 months, in half of that, I'm trying to focus on where must that 5 months be served?

MS. AKERS: Five must be served in custody.

THE COURT: What kind of custody?

MS. AKERS: Imprisonment in a federal correctional institute like Fairton, and then 5 months could be served in home detention community confinement, or like —

THE COURT: How about GP triple C that couldn't be —

MS. AKERS: Absolutely not.

THE COURT: Yes.

MS. AKERS: If your Honor would — the guideline range even if — pardon me, Kristin.

MS. HAYES: That's all right.

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[12] MS. AKERS: — 8 to 14, he still falls in at 4 months of that 8 months must be served imprisonment. There's three options that the Court has in sentencing; (a) is straight probation, where there's a zero month range, (b) would be the half and half split where you can do up to six months, you know, that's where three can be spent home confinement, three community confinement, anything in those — pardon me, in 8 — after 6 months must be served, half of that must be served in imprisonment.

MR. WILSON: If there wasn't the 4 level increase, wouldn't it be in here?

MS. AKERS: There's still a three level increase. I think you're miscalculating, if I could just bring your attention in 2F. 2C directs us to 2F1.1 where more than $20,000 we add 4 levels. Between 10 and 20 you're assuming that we don't add any, we still add three levels, which would only bring it down one level.

MR. WILSON: Which would bring it 2A?

MS. AKERS: Level 13, minus 2 for acceptance of responsibility —

MR. WILSON: 11, which would be what?

MS. AKERS: Which would still be in the 8 to 14 month range. We still must add three levels for, assuming the bribes, if we deducted under your theory the money, of course hourly wage and the different things —

[13] THE COURT: So what you're talking about here, your theory will affect only one month's incarceration.

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MS. AKERS: Well, actually the minimum guideline, it ould go from maybe 12 to a level 11.

THE COURT: No, but what I'm saying, instead of 10 months the minimum would be 8, so that half of 8 would have to be served and if it's 10, half of 10 would have to be served.

MS. AKERS: Yes, your Honor.

THE COURT: So what you're talking about —

MR. WILSON: Is one month.

THE COURT: — is one month's incarceration, yeah, yeah, okay. That's not suggesting to you that you shouldn't pursue that one month, I'm just trying to explore the effect of it.

MR. WILSON: I also will be presenting two arguments for deviation as well. And my hope is that if I can get it an 8, you know, those arguments will fare better than if it's at a —

THE COURT: Well, I don't know, you better tell me what your deviation arguments are, but let me just tell you, you've got to have an awful good ground to get a departure downgrade.

MR. WILSON: Well, one I have precedent in the —

THE COURT: Judge Shapiro?

[14] MR. WILSON: — yeah, when I have the witness, professor at Temple who's going to testify, it's my understanding Judge Shapiro did it on her own, without any witness. I actually have an expert to testify about the cultural — about how in his

opinion, obviously bribery is a crime, but the way it started it, could be viewed in a transitional, tough culture that he felt impelled to make some sort of payment as an honorarium, without insulting them.

MS. HAYES: Your Honor, if I may just briefly on that point, number one, my office has obtained approval from the Solicitor General's Office that Judge Shapiro's decision is being appealed to the Third Circuit. We think that that was wholly unwarranted. The guidelines themselves, I believe it's section 5H1.10 say that someone's national background or cultural background is not something that is to be taken into account, that all of that is —

THE COURT: All right, well, I think what we better do then is we better go ahead and take what evidence you want to offer and then we'll take what evidence you want to offer and then I'll have to do whatever it is I'm going to do.

MS. HAYES: Okay, thank you, Judge.

(End of sidebar discussion.)

THE COURT: All right, Mr. Wilson, why don't you present your evidence, please?

[15] MR. WILSON: Thank you, your Honor.

THE COURT: Unless you want to go about it in a different order. If there is anything you want to argue before you present your evidence that's all right too, whichever.

MR. WILSON: I think I'll go ahead with the evidence. Our

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first witness would be the IRS examiner.

ROBERT J. DUFFY, Defense Witness, Sworn

THE COURT CLERK: Please state your name and spell your last name.

THE WITNESS: Robert J. Duffy, D-u-f-f-y.

DIRECT EXAMINATION

BY MR. WILSON:

Q. Mr. Duffy, did you conduct an audit of Mr. Yu's taxes? A. Yes, I did.

Q. And when did you conduct this audit? A. Approximately, I mean the date I wouldn't know right off hand, approximately two years ago.

Q. Did you eventually — during the audit did you find undisclosed or underreported income? A. My calculations would have reflected that, yes.

Q. Was part of that undisclosed or unreported income monies that Mr. Yu contended was actually a loan? A. Was actually, pardon me, a what?

Q. A loan. [16] A. I think he called it originally a gift, but yes, there was a $20,000 figure in there.

Q. And did he, in fact, produce an affidavit purportedly signed by the giver of this gift or loan to you? A. No.

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Q. Did he mention an affidavit at all? A. He gave me a self-serving statement. It was an affidavit by him and his wife, not by the giver of the gift.

Q. Okay, and that was $20,000? A. Yes.

Q. How did you calculate — what was the remainder of the underreported or unreported income? A. Basically how I did it was, during the initial interview I would have asked questions regarding his income, what type of tax returns he would have prepared and the dollar amount that he would have charged per type of return. And then during the course of the exam I had totalled up the number of returns that he had prepared, breaking out the type of return that he prepared. And then coming up with an average figure for each return that was prepared and multiplying it by the number in that given category and come up with a total of receipts that should have been reported during the tax season itself, being January and I gave until the end of April.

And then I counted, to the best of my recollection, deposits made from the beginning of May till the end of the [17] year as being bookkeeping work. Okay, and then totalled figures together using that and then subtracted out what was reported on the tax return to come up with an under statement.

Q. Okay, and what about expenses, did you find expenses that were not — that were deducted that you felt were deducted improperly? A. Yes, I did.

Q. Could you elaborate on that? A. In total some of the expenditures that were reported on the Schedule C were expenditures that were related to the apartment on the second

floor of the building he had purchased. Some office in the home expenditures I think that I had recalculated in giving him for the time period that he was at, I think it was 205 Lindy Avenue. And then some other documentation or deductions that he would have claimed on his return that he didn't provide documentation for I would have thrown out. You know, I don't have the report in front of me to give you the actual numbers.

Q. But if he was able — do you agree that if he was able to document those deductions that you would have allowed them? A. Absolutely.

Q. And do you also agree that if in fact he could have shown the $20,000 was a loan or a gift, that it wouldn't be [18] taxable income? A. Absolutely.

MR. WILSON: Okay, no further questions.

CROSS-EXAMINATION

BY MS. HAYES:

Q. Just a couple if I may. Sir, it took a long time to conduct this audit, didn't it? A. Yes, it did.

Q. Did you give Mr. Yu a number of opportunities during the audit to present you with documentation about this $20,000? A. Yes, I did.

Q. Did you also give him a number of opportunities to present you with documentation or any other evidence he had about these deductions? A. Yes, I did.

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Q. Did he ever do that? A. No, he did not.

Q. Other than what you've already explained. A. Correct.

Q. Now, sir, had Mr. Yu requested you at the beginning of the audit to meet with him at the end and explain your audit results? A. Yes, he did.

Q. Did you do that? A. Yes, I did.

[19] Q. Did you tape record your meeting with Mr. Yu when you met with him? A. Yes, I did.

Q. And you, in fact, tape recorded all of your dealings with Mr. Yu and his wife throughout this audit; didn't you? A. Yes.

MS. HAYES: If your Honor may, there's just several transcripts that I'd like to introduce through this witness to aid the Court in its decision on this.

THE COURT: All right, I suppose just so everybody knows if I've got to read those transcripts, we obviously aren't going to sentence today.

MS. HAYES: Your Honor, they are long, but we've reviewed them carefully and if I can, I believe I can direct your Honor's attention to just a few relevant portions, but so there was not any questions I have copied them in their entirety.

THE COURT: Very well.

MS. HAYES: If I may I will hand them to your Honor.

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BY MS. HAYES:

Q. Sir, do you recognize this as a transcript from April 17, 1989? A. Yes, it is.

Q. Is this the day that you met with Mr. Yu to explain the results of your audit? [20] A. Yes.

MS. HAYES: And, your Honor, if I may, I would just direct the Court's attention to pages 35 and 37 of this transcript.

Could you turn to those pages, sir?

Your Honor, I will argue these facts later, but I want to just direct everyone's attention to the — this is the first time in the transcript where there is any discussion about the audit.

BY MS. HAYES:

Q. And Mr. Duffy, am I correct that on that date you received $250 from Mr. Yu and his wife? A. Yes, it is.

Q. Did you meet with Mr. Yu and his wife again following that meeting? A. Yes, I did.

Q. And was your next meeting on May 5th of 1989? A. To the best of my recollection, yes.

Q. Let me show you a transcript of the meeting that occurred on that day. Did you tape record this meeting as you had all of the other ones? A. Yes, I did.

Q. On May 5th — your Honor, I would direct your Honor's

attention to a conversation beginning at page 45 and continuing through page 50.

[21] Specifically, Mr. Duffy, could you please turn to page 48 at the top of the page and just take a moment and read this. Do you recall having this conversation with Mr. Yu that day? A. Yes, I do.

Q. When Mr. Yu said to you "make us free," what was your understanding of what he meant by that statement to you? A. My understanding was that he wanted me to compromise my position and make him free of the liability that I had presented.

Q. Had you at any point ever raised with him the idea of him paying you $5,000? A. No, I did not.

Q. He had raised that idea? A. Yes, he did.

MS. HAYES: And finally if I may, your Honor, I'm not going to ask the agent any questions about this, this is a transcript from May 10th, which is the day that the bribe was actually made. And we would just move all three of those transcripts into evidence, your Honor. I've got no other questions.

THE COURT: Yes, they'll be admitted.

MS. HAYES: Thank you, sir.

THE COURT: Now, this one you're not directing me for any petition?

[22] MS. HAYES: No, your Honor, just for the sake of the

record here I just wanted to have all of them.

THE COURT: Very well, do you have any questions of this witness?

MR. WILSON: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. WILSON:

Q. At one point Mr. Yu said to you "make me free" and he said he would favor you with $5,000 if you would "make him free"; correct? A. Yes.

Q. And then after that you met again and he in fact gave you $5,000? A. Correct.

Q. And after he gave you $5,000 you then produced a no change letter; correct? A. Correct.

Q. So it was your interpretation that "make me free" meant "make me free" of this entire tax liability, as opposed to "make me free" of some of it, or "make me free" of the worry of it. It was your interpretation that "make me free" meant, make it zero? A. The way it was presented to me, yes. That's the way I would have —

Q. Do you remember, directing your attention to page 47 — [23] A. Of which —

Q. I believe this is April 17th.

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THE COURT: 47?

MR. WILSON: Yes, your Honor.

BY MR. WILSON:

Q. Starting on page 46, do you remember saying, "Yeah, but why should I do that, I mean I don't understand why I should you know go out there and make you happy that way. You know what, why should I get it and say okay well, I'll reduce the actual tax liability, you know. if you want something from me why don't you just — I mean let's not beat around the bush, you know, okay, let's just put it as we say put all the cards on the table. I mean what do you actually want me to reduce the tax; right?" Remember that conversation? A. Yes, I do, yes.

Q. And do you remember Mr. Yu, also on page 47 saying, "You don't have to wait to reduce this tax money." Do you remember that conversation? A. Yes.

Q. And do you remember on page 48 Mr. Yu saying, "You have it, do you have the best way for me to reduce the tax?" Do you remember that question and answer? A. Yes.

Q. And do remember saying on page 49, "I can, I can reduce the tax, I can change it to zero, I can do a lot of things, [24] yeah." A. Yes.

MR. WILSON: No further questions, your Honor.

THE COURT: All right.

MS. HAYES: Just 2 questions, your Honor.

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RECROSS-EXAMINATION

BY MS. HAYES:

Q. Mr. Duffy, do you also remember asking Mr. Yu of the $250 that he gave you, if you could apply that towards the taxes he owed and him telling you no.? A. Yes I do, he told me it was for me.

Q. And do you also recall discussing with Mr. Yu that although you would not be the person from the IRS who would handle this, that it would certainly be possible for him to work out with the IRS an installment payment arrangement to pay off any taxes he owed. A. Yes, I do.

MS. HAYES: Nothing else, your Honor, thank you.

MR. WILSON: No further questions, your Honor. Oh, your Honor, we would call Mitch Benson, Mitchell Benson.

THE COURT: Ms. who?

MR. WILSON: Mitchell Benson is a CPA.

THE COURT: Very well.

MS. HAYES: Your Honor, just for the record the Government would object to this evidence on the grounds of [25] relevancy.

THE COURT: You have a running objection.

MS. HAYES: Okay.

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MITCHELL BENSON, Defense Witness, Sworn

THE CLERK: Please state your whole name for the reporter and spell your last name.

MR. WILSON: Your Honor, just for the record Arnold Silverstein and I are both co-counsel in this case and there will be times when Mr. Silverstein will be speaking to the Court and also asking questions.

THE COURT: Very well.

THE WITNESS: Mitchell E. Benson, B-e-n-s-o-n.

DIRECT EXAMINATION

BY MR. WILSON:

Q. Mr. Benson, what's your occupation? A. I'm a certified public accountant.

Q. And could you tell the Judge where you practice and in what capacity. A. I practice in Wynnewood, Pennsylvania and our clientele includes small, medium size businesses, individuals, partnerships, sole proprietors.

Q. And what is your educational background? A. I have an undergraduate education from Pennsylvania State University and I went and graduated from Villanova with my masters in taxation.

[26] Q. What is your experience as a CPA? A. As a CPA I have 11 years experience, most of which were in the field of

taxation and I've conducted numerous audits with the Internal Revenue Service representing taxpayers.

Q. Could you tell the Court approximately how many audits you have conducted with the IRS? A. 15 to 20.

Q. Are there situation — what stage do you get involved in, after the audit is over, or during the audit? A. We typically get involved at the initial indication that an audit is happening. When an audit letter is received by a client, we get involved and we assist the client in responding to the IRS inquiry. Whether it be for information, whether it be through a meeting, whether it be in office, in our office, there's various types of audits.

Q. What's the procedure for challenging an audit or contesting an audit? A. Well, what would normally happen is we would be with the client during the audit, and we would assist the client in producing information, assist in interpreting information and also assist in explaining to the IRS how that information was reported on the tax return, such as number combinations, things like that, just sort of help the IRS around the return.

Q. Could you give the Court some idea of the success rate [27] you've had having audits changed and revised? A. Well, typically when an audit report is issued you have the ability to respond to that and we've been able to provide additional evidence to the IRS in most cases where you would be able to change one of the IRS's initial findings. Such as if they found an expense was disallowed, maybe you would find an invoice later, help that client find that invoice. If you could produce copies of invoices maybe you could call the bank and get fiches of checks, things like that.

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Q. Do you find that you as a CPA as a professional are able to do that when a client couldn't do that on his own? A. We help the client, because sometimes the client doesn't know where to look for the information, or quite frankly sometimes the client isn't sure how the number got onto the return and maybe it was something we had done that has to be explained to the client.

Q. Could you tell the Court the relationship of tax penalties to these audit findings and how they are attacked. A. Well, the tax penalties are computed as a percentage of the deficiency. You know, the IRS will sometimes concede penalties. It just depends on the facts and circumstances involved.

Q. What if the taxpayer was incorrect about his decision to withhold income, but had some basis for his decision. How would that impact upon the penalties assessed in the audit? [28] A. If there was a reasonable cause under certain statutes, not all statutes, but the IRS under certain statutes would allow or would eliminate the penalty.

Q. Did you have a chance to review Mr. Yu's audit results? A. I did.

Q. Did you have a chance to meet with Mr. Yu? A. Yes, yes I did.

Q. And did you hear the testimony of the IRS agent and his explanation of the audit results? A. Yes.

Q. If you were retained to look at this audit, or to deal with the IRS on this audit; what would your approach be and do you see any areas where the audit might be incorrect? A. The first item which I would dispute would be the inclusion of the $20,000

in income, which was represented to be a loan and I would attempt to find additional evidence to support the fact that it was a loan or a gift. The second item I would look at are the expenses and just see if there was information the Internal Revenue Service did not have to support my client's representation that these indeed were deductible. And I would go right down the list.

In addition I would question the Internal Revenue Services' methodology in computing the taxes and revenues, perhaps there were extensions involved, maybe there was a double count somewhere and I would just sit and try to assist [29] the taxpayer to that extent.

Q. If, Mr. Benson, based on your experience, if the taxpayer had withheld that $20,000 in good faith involving the loan, and let's say he was wrong about that, but he acted in good faith, how would that affect the $6,000 in penalties imposed? A. Well, if there was a good faith reliance you would have perhaps a reasonable cause exception to the penalty. You know, if you felt in good faith and you relied on your knowledge, you relied on an expert that you thought that that was a loan and it later turned out to be income you could perhaps get out of some of the penalties.

Q. What was the total tax and penalty liability on this audit? A. The total tax liability, I believe, was $20,600, and I believe the total penalties were about $6,000.

THE COURT: How about interest?

THE WITNESS: That does not include interest, that does not include interest. Interest was not —

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THE COURT: Do you have any estimate what the interest would have been?

THE WITNESS: I could only guess and maybe say another $6 to $8,000.

THE COURT: I don't want you to guess, if you can say —

THE WITNESS: I'd have to estimate, I'd have to [30] calculate it then, because the rates have changed over the years.

THE COURT: All right, I don't want you guessing, thank you.

BY MR. WILSON:

Q. Mr. Benson, on any of the items that were corrected, for example that $20,000 income, would the other items, if they were corrected there would be no interest charged on those items; correct? A. That's right, there would be — it would reduce the deficiency.

Q. If the penalties were subtracted from the total tax due and as the judge said the total tax due there was no mention of any interest at that time, what would you be left with, with the 26 minus the penalties? A. It would be the amount of the penalty which would be abated by the Internal Revenue Service, you could be left with something — perhaps they would abate the penalty on at least a portion, on the 20 portion, which you reasonably thought wasn't income, but was found to be income.

Q. And if just the $20,000 was found to be a loan or a gift, how would that affect the tax due, not the penalties, but just

the tax due? How much would that — A. It would reduce the tax due by the tax rate in effect that year on the 20 and I thought that was in 1987 and the [31] rate would have been perhaps 30 percent.

MR. WILSON: Your Honor, no further questions.

MS. HAYES: Just a couple, if I may, your Honor.

CROSS-EXAMINATION

BY MS. HAYES:

Q. Mr. Benson, are you aware of the fact that Mr. Yu is himself an accountant who's practiced accounting for some years here in the Philadelphia area? A. Yes.

Q. And wouldn't you as one accountant assume that another accountant is familiar with a lot of the principles that you are talking about?

MR. WILSON: Objection.

THE COURT: I don't think I need this answer, this client's answer. I mean if that other accountant is experienced in tax work I think I know what I need to know. Unless he knows the accountant and knows what his experience is, if he does, that's different.

MS. HAYES: Let me ask that.

BY MS. HAYES:

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Q. Mr. Benson, have you ever had any professional dealings with Mr. Yu, other than in connection with this case? A. No, I have not.

Q. So do you have any knowledge from any source as to what his reputation is in the accounting community in this area? [32] A. No, I don't.

THE COURT: I'm sorry, I may have misunderstood, I'm a little hard of hearing, I may have misheard you. I thought you have previously said that Mr. Yu had consulted another accountant?

MS. HAYES: No, no, no, Mr. Yu, I asked him if he was aware of the fact Mr. Yu himself is an accountant.

THE COURT: I'm sorry, I misunderstood you. All right, why don't you go back there and start with that question again and make sure I don't have it confused.

MS. HAYES: All right, I'm sorry your Honor, I'll try and keep my voice up.

THE COURT: No, no, no, it's my fault, go ahead, just say it.

BY MS. HAYES:

Q. Mr. Benson, I think what I first asked you is, isn't it a fact that Mr. Yu is himself an accountant? A. Yes.

Q. And then I believe that I asked you have you ever had any professional dealings with him, accountant to accountant? A. No.

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Q. So your only dealings with him have been in connection with this prosecution; is that correct? A. That is correct.

Q. And do you have any knowledge from any source as to Mr. [33] Yu's reputation in the community as an accountant? A. No, I do not.

Q. You simply just don't know anything about him; is that fair to say? A. Yes.

Q. You don't mean that in any way derogatorily, but you just — as opposed to other accountants that you know, you just don't know him. A. I understand.

Q. All right, now these challenges that you have talked about that could be raised to the audit in this case, am I correct in understanding your testimony that those are just potential challenges that you see? A. Yes.

Q. All right, so with respect to the $20,000 if Mr. Yu had some other documentary evidence or other evidence, that is something that an accountant could go to the IRS and raise a challenge to; is that what your testimony is? A. Yes.

Q. All right, and this is the kind of thing you do for all your clients when they're audited, is look at what the IRS is questioning and seeing if the client has any evidence to support either things they have reported on their tax return, or things they haven't reported on their tax return; is that right? [34] A. That's right.

Q. Okay, and your success rate, is it also correct that there are times that you represented clients who don't have any such evidence and the IRS has been right. A. That's correct.

Q. Do you know of any specific evidence in support of the potential challenges that you see to this audit? A. No.

Q. And you as a CPA certainly wouldn't condone someone paying a bribe to an IRS agent?

THE COURT: No, no, no, no, no, no, no, that's not a proper question to ask.

MS. HAYES: All right, your Honor, I'll withdraw it. No further questions.

MR. WILSON: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. WILSON:

Q. You're a CPA; correct? A. Yes.

Q. You're aware that Mr. Yu is not a CPA? A. Yes.

Q. And there's significant differences between a CPA and a someone who would go under the title as a tax preparer in terms of expertise?

THE COURT: I think I can take judicial notice of [35] that.

MR. WILSON: Okay.

BY MR. WILSON:

Q. And do accountants in the accounting field, is there a

similar expression of what we have in the legal field about the lawyer who represents himself?

THE COURT: That's argument, that's argument. I don't think you want to use that argument either.

MR. WILSON: Okay, your Honor, I'll withdraw the question.

THE COURT: All right.

MR. WILSON: No further questions, your Honor.

THE COURT: Anything else?

MS. HAYES: No, nothing else, your Honor.

THE COURT: You may step down sir, thank you, you are free to leave.

(Witness excused.)

MR. WILSON: Does your Honor prefer that we give argument on the point, at this point —

THE COURT: No, I've already heard your argument on this point at sidebar and my holding is that the defendant has pled guilty to a charge of offering a bribe and it is clear from the record that he received in return a clean bill of health on a tax claim of $26,000 plus interest, and therefore I think that evidence supports the evaluation of [36] the probation office. So I will rule against you on that point.

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MR. WILSON: Okay, and your Honor, we have other witnesses to present at this time on other points.

THE COURT: Yes, I assume, now I think as to you have, as I understand a member of the faculty at Temple?

MR. WILSON: Yes, your Honor.

THE COURT: And I would like an offer of proof and then I'd like to see, does anyone have Judge Shapiro's decision?

MS. HAYES: Your Honor, I don't believe that there was a written order entered.

THE COURT: All right, well you've argued it to me and I would like an offer of proof of your evidence with respect to what I'll call the nationality aspects of your presentation.

MR. WILSON: Your Honor, basically it's the same theory that Judge Shapiro herself utilized in *Kang* case, which by the way involved the bribe of an 11,000 bribe. She on her own took into account the cultural differences between Korea and the United States. We have Dr. Choo (ph) who testified that based on his expertise that Mr. Yu would have viewed this as an honorarium, would have viewed this not to pay him money, even as an insult. And with Mr. Yu he didn't immigrate to this country till he was 49 years of age. He [37] was educated in Korea. He served in the Korean military, including during the Korean War. His formative experiences have been in Korea, and we feel that Judge Shapiro's decision is actually precedent and that this case presents a much stronger scenario than the *Kang* case and unlike the *Kang* case we actually have a witness to support this theory.

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THE COURT: All right, may I hear argument please? We've really argued at sidebar, but perhaps you should just refer me to the provision you referred me to.

MS. HAYES: The Government would contend that under section 5H1.10 of the guidelines that this evidence is in no way relevant to this proceeding. That section says that race, sex, national origin, creed, religion, and socioeconomic status are not relevant in the determination of a sentence.

THE COURT: How would you deal with that?

MR. WILSON: Your honor, I think that this is distinguishable. I think that what we're dealing with is a cultural situation, not whether your rich or poor, or I think what those go to is to your status of whether you're black or white, or what country you're from, in terms of whether you should be treated differently just on that basis. What we're saying is something a little different and that is that there is a cultural foundation that influenced Mr. Yu. And we see a difference between what the guidelines take into account [38] and what Judge Shapiro found in the *Kang* case and what we hope you will find in this case.

THE COURT: All right.

MS. HAYES: Your Honor, the Government's frankly willing to stipulate that there may be cultural differences between Korea and the United States. However on a practical level, Mr. Yu has been in this country for 20 years now. He is a naturalized American citizen, by being naturalized he agreed to abide by the laws of this country. If he viewed this as an honorarium, he wouldn't have pled guilty to bribery, because if that was what it was he wouldn't have had the requisite criminal intent. So the Government

submits that on a purely practical level this is just in no way relevant.

MR. SILVERSTEIN: Your Honor, if I may, Arnold Silverstein, co-counsel with Mr. Wilson, I apologize for being late, your Honor, I was in a meeting.

THE COURT: That's all right.

MR. SILVERSTEIN: Your Honor, I think there is a bit of a difference between whether one would plead guilty to a crime and one has — and what one may argue for purposes of sentencing. Though I think there is a significant difference culturally, Dr. Yu's upbringing is such that he functions with a different mindset than someone who was brought up in this country, that even though it may affect "intent" would [39] not be sufficient for a defense in a criminal trial. We're not in effect arguing that —

THE COURT: I understand that, I understand the distinction, you're saying that the facts that you would rely on to mitigate the guidelines or justify downward departure needn't rise to the — what's the word I want — the same level of effect as, in other words it isn't necessary that you show that they constitute a defense to the charge on the question of guilt. I understand that point, but I'm going to hold contrary to what I understand what my colleague, Judge Shapiro, has held that I do not have the power to make a downward departure based upon the factors you have advanced.

Now, please notice that I'm placing this decision on a holding that I do not have the power to consider it. I understand the Government is taking an appeal in Judge Shapiro's case. If you

take an appeal in this case I will — what are the magic words — staying execution of a sentence that I will be required to impose on the guidelines, so that you can derive the benefit, if any, from the outcome of that appeal. Because if I don't have the power that's the end of it, the sentence stands. If I do have the power then we'll come back and I will then want to hear whatever evidence you want to submit as to whether in this case that power should be exercised. And I will want to consider at that time not only the testimony that you would offer, but I would want to [40] know about Mr. Yu, his schooling, and the fact that he's been in the United States and these are all factors. But just so that it's clear I'm not exercising any discretion not to use a power that I have, I'm holding that I lack the power.

Now I believe, I must tell you, I believe that's the correct decision, but what I'm attempting to do is to structure a situation so that if I am incorrect you will get the benefit of it; all right?

MR. SILVERSTEIN: I understand, sir.

MS. HAYES: We certainly have no objection to that, your Honor, if the Third Circuit —

THE COURT: I think then, with apologies to the witnesses who have come down here to offer the evidence you intended to offer, they should understand that my ruling means no disrespect for their testimony and I don't want them to think their coming here is unappreciated because I didn't hear the testimony. But in my view of my power under the sentencing guidelines, it would be irrelevant. If the Court of Appeals says that that is wrong, then we will be back here for a determination as to whether in this case, on the facts of this case, I would exercise

that power, a matter on which I express no opinion whatever, all right.

MS. HAYES: Very well, your Honor.

MR. WILSON: Fine, sir.

THE COURT: Now if there's not anything else, why [41] don't you bring Mr. Yu forward.

MR. WILSON: Your Honor, I do have some family members to present.

THE COURT: Oh, certainly, yes, I'm sorry I didn't mean to preclude you, please do.

MR. WILSON: Just to have them introduce themselves, what they do for a living.

THE COURT: Absolutely, you do whatever you wish. I'm not trying to foreclose your presentation, you may have — I'm here for as long as we need and there is no urgency or rush.

MR. WILSON: We'll call Reverend Judge first.

MR. SILVERSTEIN: Sir, may we have him speak from here?

THE COURT: Absolutely.

TIMOTHY MICHAEL JUDGE, Sworn.

THE CLERK: Please state your full name for the record.

THE WITNESS: Timothy Michael Judge, J-u-d-g-e. I'm the assistant pastor at Mr. Yu's church in Abington, Pennsylvania and I'm just recently back, I missed a great deal of this, I was serving with the chaplain corps in Desert Storm and on my arrival home, Mr. Yu just asked me to be present with him and his family here today. It's an honor for me to do that.

[42] Mr. Yu is a daily communicant at mass and has been, as far as I know, in the past almost four years that I have religious services at the church on a daily basis for those four years, so I have known him to be a sincere and devoted family man and a religious man, because that's quite a step for somebody to daily attend mass. On that basis, I'm just here with him today to offer my support to his family.

THE COURT: All right, thank you, Father, I appreciate your coming down.

MR. SILVERSTEIN: Thank you, Father.

MR. WILSON: Now what I'd like for them each to do, your Honor, is introduce themselves and tell what they do and how they feel about their dad.

THE COURT: Sure.

TAEK YU: My name is Taek Hwan Yu, spelled T-a-e-k H-w-a-n, last name's Yu.

MR. SILVERSTEIN: Leonard, your here because of your father's situation. When did you come to this country, tell the Judge.

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TAEK YU: We came here 13 years ago, 1976.

MR. SILVERSTEIN: And Leonard, during the time you've been in this country, can you tell the Judge, did you go to school in this country?

TAEK YU: Yes, I did.

[43] MR. SILVERSTEIN: And where were you educated?

TAEK YU: I went to Harvard for two years and I graduate from Temple University, with accounting degrees.

MR. SILVERSTEIN: And Leonard, without me having to ask you, just tell the Court what kind of father Dr. Yu has been to you.

TAEK YU: Well we came to States, mainly my father's decision, for our education. He didn't have to come to States, he was living comfortable life in Korea, working in Government. And when he first came here he had to work in factory to support us and it was really tough for him. Although it was tough for him, he didn't mention to us so we don't have to worry about, you know, him. And as far as I know he never took a vacation, a day of vacation from working, so he could support us. And his main happiness of his life was to us to be successful and us to be happy, he wants nothing less and nothing more. And is really tough for me to see him to go through this, because when this happen his health was really deteriorating and he couldn't sleep several nights and he was having severe headaches and still now he's taking Chinese medicine to relieve his pressure and stress. And sometimes it works, but when stress gets worse, you know, he has to take medicine again.

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And what I'd like to say is he's been very devoted to his family, really loving, he will take nothing, he will [44] put four sons in front of him all the time. And another thing that I like to tell you is that, although he live here for 13 years, he's very Korean. For instance, every New Year's Day he expect us to have a traditional Korean vow to bless him and if somehow we forget he gets very upset. And basically he's been a very loving father and in June, coming July, it will be his 60th birthday and that's one of the biggest thing in one year want to celebrate in one's life and it would be really sad for him to be in prison when we have to celebrate his birthday.

MR. SILVERSTEIN: Okay, what kind of person is your father to other people in the community?

TAEK YU: I have some dealing with his client and he's very conscientious and very honest with client and he will do best for his client's sake.

MR. SILVERSTEIN: How about not clients just regular other people in the Korean community that are friends of the family; what kind of guy is your father?

TAEK YU: He's very, you know, giving to other people and as you know, as you are aware he's very religious and I still don't know how he manage to get up early morning and go to church every morning. And another thing that he sometime tell us is that if he was here like when he was teenager, you know, he would hold up the opportunity that U.S. provide, you know, he would have been, he'd get like 10 [45] Ph.D. by now, but I guess we're not living up to his expectation.

MR. SILVERSTEIN: Thank you. Any questions?

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MS. HAYES: No.

MR. SILVERSTEIN: John.

JOHN YU: My name is John S. Yu, I'm the second son, second oldest.

MR. SILVERSTEIN: John, tell us something about yourself and about your father.

JOHN YU: Okay, about next month I'm going to be working for the Federal Bureau of Investigations as a special agent. I've been wanting to pursue that career because of the way I was brought up watching my dad grow and I see him as a very honest person and I never seen a person who works as hard as he does. And I think if I need to go to anybody to rely on anything, I think it has to be him.

MR. SILVERSTEIN: John, how has your father helped you achieve what you've achieved?

JOHN YU: Okay, he never really imposed his personal views, but I mean I've lived under his bell for 25 years and I do see a lot of difference because he lived the majority of his life in Korea and I think he has his views stuck, I think he will never change his views until he dies. And I was brought up here and my views are different, necessarily doesn't mean they're right, but just different. Now I see [46] that he does a lot of things differently, but one thing that I think we have in common is that we both work hard and we do our best to make other people, you know, like being around us. And he's the kind of person who would never do anything to harm any person. And I think if my dad had been raised like I was here, I don't think he would

have been standing before you going through this trial. I just really see this as a basic difference in cultural thing and just to attest to different kind of things that I couldn't understand as I was growing up was during vacation times, I mean Christmas things like that, when I was going to schools, my mom would give me a little gift to send to school teachers and I really didn't understand that. But I think it all comes from their tradition where they were taught to respect their elders and someone in a higher authority to help them out. And it's hard for me still to understand why my dad is under this kind of trial, but like the only thing I could say to myself is that I don't think there was any intention to really, you know, do anything criminal, but just based on his past experience I think he could of avoid that. And I mean if there's one person that I could depend on it's my dad and I think the reason why I'm stubbornly pursuing the job with the FBI is that I see what he does in his life. And he wants — I think he loves this country, although it's not a country that he's been here for most of his life, but I can see he's [47] very, you know, he's very — I could just say that he's very — he has encouraged me for the past two years that I've been going through with the application with the FBI and things like that. And he wants me to work for the United States as hard as it might be, it might be contradicting to tell you that like, I'm going to be working for the Government when my dad's in trouble with the Government, but I think he wants it even more now that because he's going through something that's different, he might want his son to be doing something for the country that maybe he wasn't able to do.

MR. SILVERSTEIN: Chuck Yu.

YOUNG YU: My name is Young Yu.

AUDIO OPERATOR: And your first-name again?

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YOUNG YU: Y-o-u-n-g.

MR. SILVERSTEIN: Chuck, tell the Court a little bit about yourself and the influence your father was in your life.

YOUNG YU: Okay, well I'll be graduating from Penn State this year and this summer I'll be working in SmithKline Beecham. And in coming fall I'll be going to Temple Dental School. Through four years of studying, I had a hard time and you know the times of fulfillment. And the hard times I had, coming out of the hard time I would think of my dad, I work harder because he came here to work his butt off to get us into college and to make us succeed. And I'm falling down [48] I say, I shouldn't do this and I should make my parents proud of me, because all the things they went through to put us into college and that I thank my parents for that.

MR. SILVERSTEIN: Jenet. Jenet, will you tell the Judge who you are and about your father-in-law.

JENET YU: This is Jenet, J-e-n-e-t Y-u. I'm Jung Yu's daughter-in-law and I'm a current Temple Graduate School graduate, majoring in opera. Also, I've been living in his house for 2 years, ever since I got married his first son. Although I've known him only for 2 years, when I first moved into his house, many things shock me. Things like how traditional parents he was and also I thought all the accountants were very rich and own a big large house and a boat, but his house is not, if you go to see his room there is only one very old bed that makes noise whenever you get out. There are very old 2 chests, that's all he has in his room. And also I was very surprised about the fact that he sacrificed his whole life for his family and he asks anything,

— nothing in return, And I never — he never raises his voice against anybody. Also I never seen him getting angry or getting upset. And I know that everybody has something to be angry about sometimes, it's not that he doesn't get angry, I think it's that he doesn't want us to worry about anything except concentrating on our lives and just be happy. And also he used to say that in the dinner table that we all are [49] very lucky because we live in a country that opportunity and freedom provides us with and that we always should try to be more diligent. And I — it's such a shame that this happen to him, because I respect him so much. I respect him more than I respect my own father. My father-in-law is a very honest, sincere, very thoughtful, he never hurt anybody's feelings. And I feel so sad that this had happen to him.

MR. WILSON: We would call on Mr. Yu.

THE COURT: Well, now I think Mr. Yu will speak to me as a — is there anything else before Mr. Yu speaks to me? I usually hear the defendant last.

MR. WILSON: Your honor, just argument.

THE COURT: Well, I'd like to hear the argument first, then I'll hear Mr. Yu.

MR. WILSON: Okay.

THE COURT: If you'd sit down, sir.

MR. SILVERSTEIN: Your Honor, if I may, with regard to Dr. Yu, I think as the Court is somewhat constrained by the guidelines in this —

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THE COURT: Well, let me say to you at once, I guess everyone — first let me thank everyone, particularly the family members and also everyone else who has come down here to assist the defendant that certainly speaks well of him and it must be an extraordinarily difficult thing for sons and daughter-in-law to do. And it's regretful that we find [50] ourselves in this situation.

Now, everyone in this courtroom should understand that until about four years ago that judges had discretion, as a very wide discretion, as to the kind of sentence that they would impose in a criminal case. And as the lawyers here know, the Congress in the United States has removed that discretion to a large part from a Judge. So a Judge is no longer completely free to decide what he thinks is the appropriate sentence, because the Congress of the United States has laid down sentencing guidelines. And the purpose of these guidelines was to insure that different judges didn't sentence defendants in the same position in radically different ways, because it was perceived that it would be inequitable if one person did not go to prison and another person did go to prison for a very long time for basically, when you have basically the same kind of defendant and the same kind of criminal defense.

Now, I've made two rulings which affect this decision. Either I am right or I am wrong and counsel will have the opportunity of course to test those rulings in the Court of Appeals. And if I'm wrong on either of those we'll be back here.

Now as I now sit here though I am required by law to impose a sentence which is in the guideline range of 10 months to 16 months, 5 of the 10 months if that were the [51] sentence would be permitted to be served in home confinement. It is my intention to impose the minimum sentence called for by the guidelines; that is, I'm required to sentence Mr. Yu for 10 months, five of which

must be served in confinement, but five months of which may be served in home confinement. So, I understand that that is the minimum sentence I can impose if I am correct in my prior two rulings. So that while I'll be glad to hear from counsel you need not persuade me to impose the minimum sentence as we now find ourselves.

MR. WILSON: Your Honor, there is one other legal argument I want to bring to your attention and if I don't bring it up, I'm afraid I might waive it, and I understand —

THE COURT: No, I don't want you waiving anything so you bring it up.

MR. WILSON: The argument is, on page nine of the plea agreement which was drawn up by the Government and signed by the defendant, it states: the Government and the defendant understand and agree that the Court may impose any sentence authorized by law, including the sentence that departs from any applicable sentencing guideline range.

THE COURT: Sure, that's the standard language, but I still have to have a legal basis for departing. But you're making that argument for the record and you haven't waived it. Now if there's anything else you want to put on the record, please do, because I never want counsel to waive any [52] position. All right.

MR. SILVERSTEIN: Your Honor, based on what the Court has stated there's no further argument that I wish to present.

THE COURT: All right, now do you have anything, Ms. Hayes, before sentence is imposed?

MS. HAYES: No, we don't your Honor.

THE COURT: All right, now Mr. Yu, if you will come up and I will first of all hear from you.

Now, Mr. Yu, you have as I'm sure you know, the opportunity now to address me. Just let me say it's entirely your choice. If you choose to stand silent, I'm not going to hold that against you and if you speak up I'm not going to hold that against you either. So that is entirely your choice, Mr. Yu.

MR. YU: I understand. I respect (indiscernible) on a charges. I am very sorry to the United States of America's Government. Would you have mercy on me and would you like to forgive me once because this is the first time in all my life. For my future and for my family's life. I love America very much, so much, because United States of America Government save us free from Japanese Government. We have free from war under the Japanese by United States of America's favor and other thing is this, United States of Americas save us from, in Korea war. That's why I love [53] America and I like America, that's why I pray everyday in church, through mass for America's President, George Bush, and his Government's employees and for America's peoples. Also, I pray for 59 days for Thomas N. O'Neill, Jr., Judge and Kristin Hayes, United States America Attorney and Mr. Hogan and Mr. Duffy for our work being in this society. I will say may God bless America forever. Thank you, sir.

THE COURT: Thank you Mr. Yu. Now you heard my, I'm sure, my explanation as to the power that I have and the power that I don't have in this sentence. In other words, I am required by law, unless the Court of Appeals differs with the two rulings that I have made, to impose a minimum sentence of 10 months.

Appendix D

I do not have the power to avoid that. I do have the power to impose that instead of 16 months and I do have the power to provide that the second 5 months of the 10 months can be served in a period of home confinement which I understand would include work release, attendance at church — Ms. Hayes are there any other conditions of home confinement that I haven't referred to?

MS. HAYES: None that I'm familiar with, your Honor, but I would really have to defer to the probation officer, as I'm not terribly familiar with it.

THE COURT: Well, those can be worked out at the appropriate time, but they certainly include at least work release and attendance at church; do they not?

[54] MS AKERS: If your Honor so wishes.

THE COURT: Well, I do so provide, yes. As that time approaches if counsel wishes to suggest any other terms which the probation office tells me I have the power to consider, I will consider them.

MR. SILVERSTEIN: Thank you, your Honor.

THE COURT: All right, so that with respect to Counts 1 and 2, the defendant is committed to the custody of the Attorney General of the United States or his authorized representative for a period of 10 months to run concurrently each count to the other, the second 5 months of which may be served in home confinement with work release privileges and the ability to attend church and any other terms that the Court may subsequently approve upon application. I will impose on Count 1 a fine of $5,000. I will impose a mandatory assessment fee, which I'm required to do, at $50

in each count for a total of $100. I will provide for supervised release after release from incarceration for a period of 3 years on the standard conditions adopted in this district and in addition that the defendant not commit any crime, federal, state, or local or possess or have under his control any firearms or weapons, and that the defendant shall avail the probation office any requested personal or business financial information in a timely fashion.

The defendant may self report at the designated [55] institution on Monday, July 17. However, if an appeal is taken, a timely appeal is taken, counsel should submit an appropriate order and the defendant will be relieved from the reporting requirement. In other words, I intend to suspend execution of the sentence in this case until any appeal is decided and presumably the appeal from Judge Shapiro's decision would be decided prior to the appeal in this case. But in any event, so if you take an appeal, give me an appropriate order.

MR. SILVERSTEIN: Thank you, your Honor.

THE COURT: Now is there anything else counsel that we have to —

MS. HAYES: May I just ask the probation officer a question, your Honor?

THE COURT: Yes, sure.

(pause in proceedings.)

MS. HAYES: Nothing else your Honor, thank you.

Appendix D

THE COURT: All right, anything else, Counsel.

MR. SILVERSTEIN: No, your Honor.

THE COURT: All right you have a fine family, Mr. Yu, you can be proud of them, be proud of their support for you. And this isn't the happiest day of your life, but it isn't a tragic end to it either, so good luck to you, sir.

MR. SILVERSTEIN: Thank you sir.

THE COURT: Mr. Ervin?

THE COURT CLERK: All rise, please.

Court is now adjourned.

(Court is adjourned at 5:20 o'clock p.m.)

Supreme Court, U.S.
FILED
NOV 25 1992
OFFICE OF THE CLERK

No. 92-449

In the Supreme Court of the United States

OCTOBER TERM, 1992

JUNG YUL YU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a naturalized citizen born in Korea, was entitled to a downward departure from his Sentencing Guidelines range based on "cultural differences" between the United States and Korea.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 954 F.2d 951.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. A petition for rehearing was denied on February 24, 1992. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on May 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Pennsylvania

to two counts of bribery of a public official, in violation of 18 U.S.C. 201(b)(1)(A). He was sentenced under the Sentencing Guidelines to ten months' imprisonment, to be followed by three years of supervised release. Pet. App. 24a-27a.

1. Petitioner, a naturalized citizen who immigrated from Korea in 1976, is an accountant engaged in the business of preparing tax returns. Between August 1988 and May 1989, an Internal Revenue Service agent conducted an audit of the tax returns filed by petitioner and his wife for 1985, 1986 and 1987. During the audit, petitioner asked the agent to be his "good friend" and "do a favor" for him.[1] Petitioner's wife gave the agent $30 in cash on two occasions during the audit. Pet. App. 4a-5a; C.A. App. 5a.

On April 17, 1989, petitioner and his wife met with the agent to discuss the audit and gave him $250 in cash, telling him that the money was for him, not for taxes. The agent then advised petitioner that petitioner owed $27,000 in tax deficiencies and penalties. Petitioner asked the agent to use his discretion and "do a favor" for him. In a meeting on May 5, 1989, petitioner offered to pay the agent $5,000 to "make them free," and he told the agent that the matter would have to be a secret. Five days later, petitioner

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[1] In 1987, the IRS had investigated the Woo Jung Bar, a business owned by Young Hak Kim, for payroll tax deficiencies. During a meeting with an IRS agent, Kim telephoned petitioner, who spoke to the agent about the taxes paid by Kim's business. Petitioner at that time also asked the agent to "do a favor" for Kim and to "help his client out" regarding the tax assessment proposed by the agent. C.A. App. 5a.

gave the agent $5,000 in cash in exchange for a "no-change" letter for the audit. Pet. App. 5a; C.A. App. 5a-6a.

2. The Sentencing Guidelines prescribed a range of 10-16 months' imprisonment for petitioner, based on a total offense level of 12 and a criminal history category of I. Pet. App. 27a. At the sentencing hearing on May 15, 1991, petitioner asked the district court to depart downward from the Guidelines range because of "cultural differences" between the United States and Korea. *Id.* at 5a-6a. Petitioner offered to call an expert witness to testify that a Korean would consider a bribe to a government official as an "honorarium" and would view the failure to offer such a payment as an insult to the government official. *Id.* at 6a, 60a.

The district court ruled that it had no authority to depart from the Guidelines sentencing range based on "cultural differences." The court accepted the government's argument that Section 5H1.10 of the Guidelines, which provides that "national origin" (along with race, sex, creed, religion and socio-economic status) is "not relevant in the determination of a sentence," prohibited such a departure. See Pet. App. 6a, 60a-64a. Petitioner was sentenced to ten months' imprisonment, with the final five months to be served in home confinement with work release and church attendance privileges. *Id.* at 25a-26a.

3. The court of appeals affirmed. Pet. App. 3a-11a. The court held that the facts of this case did not require it to decide whether the term "national origin," as used in the Sentencing Guidelines, included any cultural differences that might be related to a

defendant's foreign background, because on the facts presented by petitioner it was "perfectly clear * * * that the district court would have abused its discretion if it had departed downward in this case." Pet. App. 7a-8a. The court explained that although petitioner "point[ed] to his Korean origin as the source of his cultural values, he never contended in the district court that at the time of the bribes in this case he did not understand that his actions violated our laws." *Id.* at 8a; see 954 F.2d at 954. The court also noted that petitioner had been in the United States for approximately 12 years and was a naturalized citizen at the time of the offense; that he was a professional tax preparer and property owner with at least some familiarity with United States law; and that he had been well educated in Korea and had had some legal education, as well as some college-level education in the United States. *Id.* at 4a, 9a. Under the cir-cumstances of this case, the court found "no basis to avoid the obvious conclusion that [petitioner] was motivated to offer a $5,000 bribe to avoid a $27,000 tax liability by a desire to save $22,000, rather than by his belief that he was culturally bound to make the offer." *Id.* at 10a.

Judge Becker dissented. Pet. App. 12a-22a. Although he found an assertion of "cultural differences," without further definition, "too broad a basis for departure," Pet. App. 18a, Judge Becker argued that Section 5H1.10 does not completely foreclose a departure from the Guidelines range "based on excusable ignorance of American cultural norms that led to [a defendant's] criminal conduct." *Id.* at 20a. Judge Becker acknowledged that, for the reasons given by

the majority, he "suspect[ed] that [petitioner], a tax preparer who has lived in this country for many years, either knew or should have known that the United States does not tolerate taxpayers bribing tax collectors," but he "view[ed] that question as a disputed fact." *Id.* at 21a. He therefore would have vacated the sentence and remanded the case for the district court to decide whether to depart from the Guidelines range. *Id.* at 21a-22a.

ARGUMENT

1. Petitioner renews his contention that the district court should have considered departing downward from the sentencing range otherwise applicable under the Sentencing Guidelines because of "cultural differences" between the United States and petitioner's native Korea. Pet. 5-14. Petitioner contends that those cultural differences rendered his conduct substantially less culpable than that contemplated by the Sentencing Commission in establishing the Guidelines range for his offense. As the court below held, however, petitioner's case does not present the issue on which he seeks review. The court of appeals expressly declined, Pet. App. 7a-8a, to decide whether the Sentencing Guidelines would ever permit a downward departure based on "cultural differences," or whether all such differences were subsumed under the general prohibition against considering "national origin" as a factor in sentencing. See Guidelines § 5H1.10. The court "assume[d] without deciding that in some cases the cultural differences between the United States and another country may justify downward departure," Pet. App.

8a, but concluded that petitioner was not entitled to such a departure based on the facts of his case.

The court of appeals noted that petitioner was a well-educated individual with some sophistication in legal and tax matters (particularly since his professional practice involved preparing tax returns). Moreover, petitioner had become a naturalized citizen of the United States, and had lived in this country for 12 years before committing his offense. Pet. App. 9a. The court of appeals pointed out that petitioner "never contended in the district court that at the time of the bribes in this case he did not understand that his actions violated [United States] laws." *Id.* at 8a. On these facts, the court concluded that it was "perfectly clear * * * that the district court would have abused its discretion if it had departed downward in this case." *Id.* at 7a. Petitioner's challenge to that essentially factual determination does not warrant further review by this Court.

2. Even if the court had reached the issue, however, it would have been correct to reject petitioner's claim on the ground that a district court may not depart from the Guidelines sentencing range based on cultural differences between the United States and the defendant's country of origin. Under 18 U.S.C. 3553(b), a district court must impose a sentence within the applicable Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." See, *e.g.*, *Burns* v. *United States*, 111 S. Ct. 2182, 2184-2185 (1991). In the Sentencing Reform Act of 1984,

Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." Pub. L. No. 98-473, Tit. II, § 217(a), 98 Stat. 2020, codified at 28 U.S.C. 994(d).[2] To that end, Guidelines § 5H1.10 provides that those enumerated factors "are not relevant in the determination of a sentence."[3] Because a departure from the Guidelines range based on cultural differences between the United States and an immigrant defen-dant's native country would necessarily be based on the defendant's "national origin," such departures are not permitted under 18 U.S.C. 3553(b) and Guidelines § 5H1.10. Cf. *United States* v. *Natal-*

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[2] We agree with the dissent below, Pet. App. 16a-18a, that the legislative history of Section 994(d) adds little if anything to the meaning of the statutory language. See S. Rep. No. 225, 98th Cong., 1st Sess. 171 & n.409 (1983). Unlike the dissent, however, we believe that a claim of "cultural differences" based on having been reared and lived for an extended period in a foreign country before emigrating to the United States is comprehended within the statutory term "national origin."

[3] Unlike the policy statements in Guidelines §§ 5H1.1-5H1.6 that provide that certain factors are "not ordinarily relevant" in determining whether a sentence should be outside the guideline range, Section 5H1.10 flatly prohibits the consideration of race, sex, national origin, creed and socioeconomic status for any sentencing purpose. See, *e.g.*, *United States* v. *Mogel*, 956 F.2d 1555, 1561-1562 (11th Cir.), cert. denied, 113 S. Ct. 167 (1992); *United States* v. *Takai*, 941 F.2d 738, 742 (9th Cir. 1991); *United States* v. *Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991); *United States* v. *Hatchett*, 923 F.2d 369, 372-375 & n.4 (5th Cir. 1991); *United States* v. *Deigert*, 916 F.2d 916, 919 & n.1 (4th Cir. 1990); *United States* v. *Lowden*, 905 F.2d 1448, 1450 (10th Cir.), cert. denied, 111 S. Ct. 206 (1990).

Rivera, 879 F.2d 391, 393 (8th Cir. 1989) (assumed prohibition against considering "cultural background" would be constitutional); *United States* v. *Restrepo*, 936 F.2d 661, 670 (2d Cir. 1991) (court remanded for resentencing where unclear whether defendant's statement that his girlfriend should receive a lighter sentence because Colombians "like to tell [their] women what to do" resulted in departure based in part on "national origin").

To our knowledge, no court of appeals has held that a district court has discretion to depart from the Guidelines range based on cultural differences between the United States and the defendant's country of origin.[4] The cases upon which petitioner relies, Pet. 8-14, are plainly distinguishable. In *United States* v. *Big Crow*, 898 F.2d 1326, 1332 (8th Cir. 1990), the court upheld a downward departure under Guidelines §§ 5H1.5 and 5H1.6 based on the defendant's "excellent employment history, solid community ties, and consistent efforts to lead a decent life in [the] difficult environment [on an Indian reservation]." In that case, Section 5H1.10 was mentioned only in a footnote in the majority opinion and in the dissent, and both the majority and the dissent focused on the factors of "race" and "socioeconomic status" rather than on "national origin." In any event, neither opinion in the case suggests that Big Crow labored under any misapprehension as to the wrongness of his acts (aggravated assault on his wife and on a drinking

[4] The only case of which we are aware that squarely raised the issue was vacated by the Third Circuit, in an unpublished decision, in response to the government's appeal. See *United States* v. *Kang*, 950 F.2d 724 (3d Cir. 1991) (Table).

companion) because of "cultural differences" between Native American and mainstream American societies.

In *United States* v. *Jagmohan*, 909 F.2d 61 (2d Cir. 1990), the defendant, who had come to the United States nine years before his offense, attempted to bribe an official by writing him a personal check. The court concluded that the defendant's stable employment history and his "unusually unsurreptitious conduct in undertaking the bribery," taken together, were sufficiently exceptional to justify a downward departure. *Id.* at 65. The court's opinion offers no insight into what might have accounted for the defendant's "utter lack * * * of the sophistication usually shown by persons bribing an official," *ibid.*; in any event, it does not attribute the defendant's conduct to his foreign origins. Whatever the merits of the *Jagmohan* decision, its reasoning does not conflict with the decision of the court below with respect to the relevance of a claim of "cultural differences" under the Sentencing Guidelines.

Finally, in *United States* v. *Takai*, 930 F.2d 1427, superseded, 941 F.2d 738, 742-744 (9th Cir. 1991), the Ninth Circuit upheld downward departures for two defendants convicted of bribing an agent of the Immigration and Naturalization Service. The sentencing court in *Takai* concluded that the defendants' conduct constituted "single acts of aberrant behavior." *Id.* at 744; see United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, ch. 1, Pt. A, § 4(d).[5] Although both defendants

[5] See also *United States* v. *Andruska*, 964 F.2d 640, 645 (7th Cir. 1992) (criticizing *Takai*'s broad view of "aberrant behavior").

were of Japanese origin, nothing in the court's opinion suggests that Japanese culture would have condoned bribing officials, or that any cultural misperception contributed in any way to their actions or to the district court's decision to mitigate their sentences.

3. Petitioner also contends, Pet. 15-18, that the district court had discretion to depart from the Guidelines range because Guidelines Parts 5H (including Section 5H1.10) and 5K (dealing with departures in general) are "policy statements," as opposed to "guidelines," and as such were not binding on the district court. That claim has been foreclosed, however, by this Court's decision in *Williams* v. *United States*, 112 S. Ct. 1112 (1992). In *Williams*, the Court held that "policy statements" that prohibit a district court from taking certain factors into account provide "an authoritative guide to the meaning of the applicable guideline," so that failure to comply with such a policy statement results in an incorrect application of the Guidelines themselves. *Id.* at 1119-1120. Section 5H1.10 is the same sort of "prohibitory" policy statement that was at issue in *Williams*. Thus, petitioner's argument that "a sentencing court may consider policy statements * * * [but] is not controlled by them," Pet. 18, has already been rejected by this Court.

4. Finally, petitioner contends, Pet. 19-21, that the court of appeals' decision that a downward departure based on "cultural differences" would have been an abuse of discretion in this case, even if such departures might in some circumstances be permitted under the Guidelines, improperly denied him the op-

portunity to present his evidence of such differences to the district court in the first instance. Petitioner did, however, make an offer of proof to support the departure before the district court, Pet. App. 60a-64a, and he does not identify any new or additional evidence that he would present if the case were remanded to the district court. There was no need for the court of appeals to remand the case, because the court could properly conclude from the record that even if petitioner's proffered evidence were received and accepted as true, no departure based on cultural differences would be justified. The court of appeals did not "speculat[e] that the testimony and evidence [offered by petitioner] would not have swayed the trial judge," Pet. 21; it held that the judge would have abused his discretion had he been swayed. That holding was within the province of the court of appeals in interpreting the existing record, and it warrants no further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992